SECTION 10(J) MANUAL

OFFICE OF THE GENERAL COUNSEL

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PREFACE

This Manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to his authority under Section 3(d) of the Act. It is designed only to provide operational and procedural guidance for the Agency's staff in administering the National Labor Relations Act. It is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the law, evidence, or procedure. The matters contained herein are not General Counsel or Board rulings or directives and are not a form of authority binding on the General Counsel or the Board.[1]

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1.0 INTRODUCTION

This is the first partial revision of the 10(j) Manual since it was comprehensively revised in June 2001. The 10(j) standards applicable to each of the circuits, included in Appendix D, have been updated to incorporate developments in recent 10(j) case law and theories regarding the need for injunctive relief. Many sections of the User's Guide, as well as many of the other documents provided to assist the Regions in preparing and litigating their 10(j) cases in district court, have also been updated.

The 10(j) Manual is intended to be a general guideline for the processing of 10(j) cases. The Manual consists of two parts: the User's Guide and the Appendixes which follow. The User's Guide will explain each step in the process, from identification and investigation through litigation in Federal district court, instruct Board agents on their responsibilities in processing 10(j) cases, identify various issues that may arise in processing a case, and provide necessary information to successfully address those issues.

To assist in meeting those responsibilities, this guide contains material to help identify the situations in which interim injunctive relief under Section 10(j) may be necessary. It also explains how to conduct an investigation to elicit evidence relevant to determining whether 10(j) relief is "just and proper" in a particular case. This guide provides instruction on the procedure to follow once a Regional Office has decided that a case warrants immediate injunctive relief, including the preparation of the memorandum recommending 10(j) relief, the preparation of papers for district court, how to argue the case in district court, and how to address any other litigation issues that may arise.

The appendices that follow the User's Guide contain material to support Board agents throughout the 10(j) process. Among other things, there are checklists, suggested questions for investigation, sample documents, model arguments, and citations to relevant research material. Of course, Board agents should use these documents to the extent they are relevant to their 10(j) case, and modify them as needed to fit the facts or particular legal theories in their case. For ease of use, Board agents can obtain access to many of these documents on the Agency's Intranet. This will allow Board agents to download into their computers the necessary documents for processing their 10(j) cases.

This manual was prepared by the Injunction Litigation Branch with the sole purpose of supporting the Regions in their efforts to achieve a prompt and effective remedy in those cases which require immediate 10(j) injunctive relief. The material was prepared based on the knowledge and experience of legions of Board agents who have litigated 10(j) cases throughout the country. Please contact the Injunction Litigation Branch if additional assistance is needed at any time.

1.1 General 10(j) Principles

Section 10(j) of the Act authorizes the Board to seek injunctive relief in U.S. District Court in situations where, due to the passage of time, the normal adjudicative processes of the Board likely will be inadequate to effectively remedy the alleged violations. Such injunctive relief may be sought as soon as an unfair labor practice complaint is issued by the General Counsel and remains in effect until the unfair labor practice case is finally disposed of before the Board. It may be requested by the charging party or sought by the Regional Office, sua sponte. It is imperative that Board agents be aware of the types of situations where such relief may be appropriate, the requirements of the investigative process in those situations, and the internal procedures to be followed in such cases.

Congress created 10(j) relief as a means to preserve or restore the lawful status quo ante, so that the purposes of the Act are not frustrated and the final order of the Board is not rendered meaningless by the passage of time. Congress recognized that a respondent's illegal acts could, in some cases, permanently alter the situation and prevent the Board from effectively remedying the violations by its final order. Thus, to justify 10(j) relief, the Board must demonstrate how the alleged violations threaten statutory rights and the public interest while the parties await a final Board order.

This involves two elements of proof:

1. a sufficient showing that an unfair labor practice has occurred; and

2. a sufficient showing that there is a threat that the Board's ultimate remedial order will be a nullity.

The first element is often referred to as the "merits analysis," and the latter element is often referred to as a threat of "remedial failure." In most circuits these elements are tested under the two-prong analysis of whether there is "reasonable cause to believe" that the Act has been violated as alleged in the unfair labor practice complaint; and whether interim injunctive relief, pending a final Board order, is "just and proper." The First, Seventh, Eighth, and Ninth Circuits have abandoned the "reasonable cause" test as the limit of a district court's inquiry into the merits of the unfair labor practice case and held that requests for 10(j) injunctions should be evaluated under traditional equitable principles. A more precise definition of the standards for each circuit is set out in the Model 10(j) standards for each circuit contained in Appendix D.

The merits analysis of a 10(j) case is the same as the merits determination of any unfair labor practice charge. What distinguishes a 10(j) case from other unfair labor practice cases is the threat of remedial failure. This threat may be demonstrated by the nature and extent of the alleged violations, and the anticipated and actual impact of the unremedied violations upon statutory rights that is expected to continue until a Board order issues. For instance, if an unfair labor practice complaint alleges that an employer

unlawfully discharged an employee during a union organizing campaign, interim reinstatement of the discriminatee may be necessary to avoid "chilling" the remaining unit employees' support for the union or their willingness to engage in protected union activities during the Board proceedings.

Courts differ as to whether the Board must introduce direct evidence of "chill" to establish that such injury, or chill, is threatened. Generally, many courts have been willing to examine the very nature and extent of the particular unfair labor practices to determine, by inference or presumption, whether the violation will, over time, tend to chill or undermine remaining unit employee support for a union. Other courts appear less likely to infer a chilling effect on employee statutory rights; instead, they insist upon evidence that the violation is actually having a chilling effect. In either case, however, direct evidence of chill is always probative as to the need for 10(j) relief and should be sought in every 10(j) case.

The quantum of evidence required to establish the need for 10(j) relief varies depending upon the type of case involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. The absence of direct evidence of impact in a particular case does not necessarily mean that 10(j) proceedings are inappropriate. The existence or absence of such evidence is always relevant to the evaluation of a case, however, and the Regions should always attempt to obtain such evidence.

2.0 IDENTIFYING POTENTIAL 10(J) CASES

Early identification of potential 10(j) cases is critical to avoid the threat of remedial failure. When a case warrants 10(j) relief, the longer it takes to obtain that relief, the greater the threat of remedial failure. For this reason, Board agents should evaluate every new charge to determine whether it might be a potential 10(j) case.

Most potential 10(j) cases are identified at the outset by the charging party who requests 10(j) relief. However, a substantial portion of 10(j) requests are sua sponte, i.e., the regions identify the case as requiring 10(j) relief even if the charging party does not. For this reason, Board agents should "think 10(j)" even if there is no specific request. In addition, although most 10(j) cases are identified around the time an initial charge is filed, in others the need for injunctive relief might not arise until the respondent has demonstrated a pattern of violations over a period of time. Therefore, Board agents should be alert at every stage of case processing for the potential need for a 10(j) injunction.

2.1 Categories of 10(j) Cases

The Board may seek 10(j) injunctions for any alleged violation of the Act, other than those enumerated in Section 10(l). The following categories of cases, however, are particularly likely to threaten the efficacy of the Board's order.[2]

[2] A separate list of the 10(j) categories in outline form is located in App. A of this Manual.

1. Interference with organizational campaign (No majority union support)

In these cases the union has either not obtained a card majority from employees in an appropriate unit or the Region's complaint does not seek a remedial bargaining order for some other reason. The 10(j) proceedings are authorized to prevent the irreparable destruction of a union's nascent organizational campaign. These cases usually involve an employer's response to an organizational campaign with serious, if not massive, unfair labor practices: threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges. Such violations virtually "nip in the bud" the union's campaign or clearly threaten to do so if not immediately enjoined. Accordingly, an order is typically sought to enjoin the violations alleged, as well as an affirmative order to reinstate any discriminatees. See generally *Schaub v. West Michigan Plumbing & Heating*, 250 F.3d 962 (6th Cir. 2001); *Sharp v. Webco Industries*, 225 F.3d 1130 (10th Cir. 2000); *Pye v. Excel Case Ready, Inc.*, 238 F.3d 69 (1st Cir. 2001); *Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874 (3d Cir. 1990); and *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744 (9th Cir. 1988).

2. Interference with organizational campaign (Majority union support)

These cases are the same as those in the previous category, except that the union has obtained a card majority in an appropriate unit, and the Region's complaint pleads that the unfair labor practices are sufficiently egregious to preclude the holding of a fair election and thus warrant the imposition of a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).[3] In such cases, the relief typically sought includes a broad cease and desist order, an affirmative order to reinstate any discriminatorily discharged employees and, to ensure that the Board's ultimate remedial *Gissel* bargaining order will not be a nullity—i.e., for the benefit of a union totally bereft of employee support—an interim bargaining order will also be requested. See generally *Scott v. Stephen Dunn & Associates*, 241 F.3d 652 (9th Cir. 2001); *NLRB v. Electro-Voice, Inc.***,** 83 F.3d 1559 (7th Cir. 1996); *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975). Accord: *Levine v. C&W Mining Co.*, 610 F.2d 432 (6th Cir. 1980); *Asseo v. Pan American Grain Co.*, 805 F.2d 23 (1st Cir. 1986).

3. Subcontracting or other changes to avoid bargaining obligation

These cases involve an employer's implementation of a major entrepreneurial-type decision which impacts adversely on unit employees: for example, subcontracting or relocating entire plants, departments, or product lines. Such changes may be

[3] All *Gissel* cases must be submitted to the ILB for 10(j) consideration. See Memorandum GC 99-8 *Guideline Memorandum Concerning Gissel*. Also, for guidance on preparing the court papers for a *Gissel* 10(j), see App. G-2 of this Manual.

discriminatorily motivated—i.e., designed either to interfere with an organizational campaign or to escape from an incumbent union—and, therefore, may violate Section 8(a)(3). In addition, these changes can independently violate Section 8(a)(5) if undertaken without bargaining over the decision, when required, with the incumbent union. In these types of cases, the Board seeks 10(j) relief, including the affirmative restoration of operations, because of the devastating impact such decisions can have on the affected bargaining units—namely, elimination of all or a substantial part of the unit and termination of unit employees. The injury done to the union, either the incumbent or the one seeking recognition, is very often fatal unless injunctive relief is obtained. Moreover, by restoring and preserving the status quo ante, injunctive relief freezes the circumstances, thereby permitting the Board to issue a final restoration order which will not be judged later by an enforcing circuit court as too burdensome on the respondent because of the passage of time or the alienation of the old facility or equipment. See generally *Hirsch v. Dorsey Trailers*, 147 F.3d 243 (3d Cir. 1998); *Maram v. Universidad Interamericana de Puerto Rico,* 722 F.2d 953 (1st Cir. 1983); *Aguayo v. Quadrtech Corp.*, 129 F.Supp.2d 1272 (C.D.CA 2000); and *Dunbar v. Carrier Corp.*, 66 F.Supp.2d 346 (N.D.N.Y. 1999).

4. Withdrawal of recognition from incumbent

These cases involve an employer's withdrawal of recognition from, or its refusal to bargain a new agreement with, an incumbent union, where the employer is unable to prove an actual loss of the union's continued majority status. Very often, such a withdrawal of recognition is accompanied by other independent unfair labor practices designed to undermine employee support for the incumbent union. This category includes withdrawal of recognition from a newly certified union, when the union is first attempting to establish itself among the employees. The l0(j) relief is sought in these cases, including affirmative bargaining orders, to ensure that the employees will not be denied the benefits of union representation for the entire period of litigation before the Board and to prevent the irreparable injury to the union's support among the employees which predictably would occur if the union were unable to represent them. See generally *Dunbar v. Park Associates, Inc.*, 23 F.Supp.2d 212, 218 (N.D.N.Y.), affd. mem. 166 F.3d 1200 (2d Cir. 1998); *Brown v. Pacific Telephone & Telegraph Co.*, 218 F.2d 542 (9th Cir. 1955); *D'Amico v. Townsend Culinary, Inc.*, 22 F.Supp.2d 480, 492 (D.Md. 1998; *Overstreet v. Tucson Ready Mix, Inc.*, 11 F.Supp.2d 1139, 1148-1149 (D.Ariz. 1998); *De Prospero v. House of the Good Samaritan*, 474 F.Supp. 552 (N.D.N.Y. 1978); *Sachs v. Davis & Hemphill, Inc.*, 295 F.Supp. 142 (D.Md. 1969), affd. 71 LRRM 2126 (4th Cir. 1969), vacated as moot and opinion withdrawn 72 LRRM 2879 (4th Cir. 1969).

5. Undermining of bargaining representative

This category closely resembles the previous category in that the cases involve a variety of employer unfair labor practices designed to undermine employee support for an incumbent or newly certified union; however, in this category, the employer has not literally withdrawn recognition from the union but has taken action which belittles the

union in the eyes of employees and impairs the union's authority to effectively represent employees. The violations can include threats, the discharge of key union officers or activists, or implementing important changes in working conditions either discriminatorily or without bargaining with the union. The need for l0(j) relief is to prevent the predictable, irreparable erosion of employee support for the incumbent union. See generally *Arlook v. Lichtenberq & Co.,* 952 F.2d 367 (11th Cir. 1992); *Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874 (3d Cir. 1990); *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902 (3d Cir. 1981); *Morio v. North American Soccer League,* 632 F.2d 217 (2d Cir. 1980); *Overstreet v. Thomas Davis Medical Centers*, 9 F.Supp.2d 1162 (D.Ariz. 1997); *Silverman v. Major League Baseball Player Relations Committee,* 880 F.Supp. 246 (S.D.N.Y.), affd. 67 F.3d 1054 (2d Cir. 1995).

6. Minority union recognition

Cases in this category typically involve alleged violations of Section 8(a)(2) and (b)(1)(A) where an employer grants exclusive recognition to a union that does not represent an uncoerced majority of employees in the unit. The cases can also include a wide variety of illegal assistance to and/or domination of a labor organization. The danger posed by such cases is that, absent interim relief, the assisted union will become so entrenched in the unit that the affected employees will be unable freely to exercise their Section 7 right to select or reject union representation. See generally *Kaynard v. Mego Corp.,* 633 F.2d 1026, 1033-1035 (2d Cir. 1980); *Fuchs v. Jet Spray Corp.*, 560 F.Supp. 1147, 1156 (D.Mass. 1983), affd. per curium 725 F.2d 664 (1st Cir. 1983). Accord: *Zipp v. Dubuque Packing Co.*, 112 LRRM 3139 (N.D.Ill. 1982).

One court rejected this theory as grounds for interim relief because, under the status quo, employees enjoyed the benefits of a fair contract and the result of an injunction would have been to leave employees unrepresented during the time the 8(a)(2) case was pending before the Board. *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138 (3d Cir. 1975). A 10(j) injunction to withdraw recognition from a minority union may be appropriate notwithstanding such considerations where the injunction makes an election possible before the Board decision issues. Thus, we have sought Section 10(j) if the petitioning union indicates it will, upon issuance of an injunction, make a request to proceed to an election and agree to withdraw the 8(a)(2) charge if the allegedly assisted union wins (cf. *Carlson Furniture Industries*, 157 NLRB 851 (1966), and the Regional Director is satisfied that the injunction will restore the conditions necessary to a free and fair election.

7. Successor refusal to recognize and bargain

In this category, an employer acquiring a business and becoming the legal "successor" to an existing bargaining relationship under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), has refused to recognize and bargain with the predecessor employer's incumbent union. In some cases, the finding of a successorship may be predicated on the

employer's allegedly discriminatory refusal to hire the predecessor's employees in a deliberate attempt to avoid any bargaining obligation. The danger of irreparable injury is similar to that present in the withdrawal of recognition situation, i.e., that the employees are denied the benefits of union representation for the entire duration of the Board proceeding and the passage of time foreseeably will sever employee ties and loyalty to the union. See generally *Hoffman v. Inn Credible Caterers*, 247 F.3d 360 (2d Cir. 2001), motion to vacate as moot filed (May 21, 2001); *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221 (6th Cir. 1993); *Asseo v. Centro Medico del Turabo*, 900 F.2d 445 (1st Cir. 1990); *Scott v. El Farra Enterprises, Inc.*, 863 F.2d 670 (9th Cir. 1988).

8. Conduct during bargaining negotiations

In these cases, one party to a collective-bargaining relationship has engaged in a refusal to bargain in good faith. The violation may be based on a wide variety of situations—such as a refusal to meet and bargain, a refusal to supply relevant and necessary information requested by the other party, an insistence to impasse during negotiations on a permissive or illegal subject of bargaining, or a course of conduct reflecting a bad-faith refusal to bargain with an open mind and a sincere desire to reach an acceptable agreement. Where such violations pose a real danger of creating industrial unrest and/or of undermining employee support for the union, l0(j) relief may be appropriate. See generally *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153 (1st Cir.); affg. 876 F.Supp. 1350 (D.P.R. 1995); *Kobell v. Paperworkers*, 965 F.2d 1401 (6th Cir. 1992); *Fleischut v. Burrows Paper Corp.*, 162 LRRM 2719, 2723 (S.D.Miss. 1999); *Silverman v. Reinauer Transportation Co.*, 130 LRRM 2505 (S.D.N.Y. 1988), affd. mem. No. 89-6010 (2d Cir. June 23, 1989); *Boire v. SAS Ambulance Service*, 108 LRRM 2388 (M.D.Fla. 1980), affd. per curium 657 F.2d 1249 (5th Cir. 1981); *Douds v. Longshoremen ILA*, 241 F.2d 278 (2d Cir. 1957).

9. Mass picketing and violence

This category encompasses cases in which a labor organization or its agents have engaged in restraint or coercion of employees, typically those who choose to refrain from engaging in Section 7 activities such as a strike. These violations of Section 8(b)(1)(A) include: mass picketing which blocks ingress and egress to the plant or worksite; violence and threats thereof at or away from a picket line; and damage to private property. In these cases, there is, of course, a concurrent State interest which may be protected through local police authorities and the State court system. However, there are cases in which State authorities are unwilling or unable to control the situation; in those cases, 10(j) relief is warranted because the threatened injury cannot be adequately remedied by a Board order issued many months later. See generally *Frye v. District 1199*, 996 F.2d 141 (6th Cir. 1993); *Squillacote v. Meat & Allied Food Workers Local 248*, 534 F.2d 735 (7th Cir. 1976). As to the comity issues, compare *Clark v. Mine Workers (Clinchfield Coal)*, 714 F.Supp. 791 (W.D.Va. 1989), and *Clark v. Mine Workers (Covenant Coal)*, 722 F.Supp. 250 (W.D.Va. 1989).

10. The 8(d) and (g) notice requirements for strike or picketing

These cases involve union strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (Federal and State mediation) and 8(g) (notices to health care institutions). When unions engage in such violations, and where the economic activity is having or threatens to have a substantial adverse impact on the other party's operations, l0(j) relief is often sought. Absent quick relief, the Board's final order may not adequately restore the status quo, ensure that the parties' dispute will be open to the ameliorative effects of mediation under Section 8(d), or that adequate arrangements for the continuity of patient care may be made by the affected institution under Section 8(g). The relief sought includes the cessation of the strike and picketing unless and until the union properly complies with the requirements of 8(d) or (g). See generally *McLeod v. Compressed Air Workers*, 292 F.2d 358 (2d Cir. 1961). Accord: *McLeod v. Communications Workers*, 79 LRRM 2532 (S.D.N.Y. 1971).

11. Refusal to permit protected activity on private property

These cases involve an employer's interference with the right of employees to engage in protected Section 7 activity in nonworking areas on the private property of an employer. Such activity can include employee picketing or handbilling arising from a labor dispute; it may, in certain circumstances, encompass nonemployee efforts to disseminate organizational material to employees. Such cases involve an analysis of the employer's private property rights, the Section 7 rights being exercised or restrained, and any alternative means of communication; Where the protected rights prevail, an employer's denial of or interference with such rights violates Section 8(a)(1) of the Act. See *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). When the employer's illegal conduct is having a substantial adverse impact on the protected activity, 10(j) relief may be warranted, inasmuch as these disputes are often of a temporal nature. Absent quick relief, the Board's ultimate remedial order will come too late. See *Eisenberg v. Holland Rantos Co.*, 583 F.2d 100 (3d Cir. 1978). But see *Silverman v. 40-41 Realty Associates, Inc.*, 668 F.2d 678 (2d Cir. 1982).

The 10(j) relief also may be appropriate where the denial of access to an incumbent union constitutes a unilateral change in terms and conditions of employment. See *Sheeran v. American Commercial Lines*, 683 F.2d 970 (6th Cir. 1982).

12. Union coercion to achieve unlawful object

These cases typically involve union conduct violative of Section 8(b)(1)(B), (b)(2), or (b)(3) of the Act. Very often the misconduct arises in negotiations where the union insists to the point of impasse that an employer agree to a permissive or illegal subject of bargaining, or where the union's conduct amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective bargaining or grievance adjustment. Where the union's misconduct creates industrial unrest or is

having substantial adverse impact on the employer's operations, or is affecting employees in a unique and possibly irreparable manner, 10(j) relief becomes appropriate. See generally *Boire v. Teamsters*, 479 F.2d 778 (5th Cir. 1973), rehearing denied 480 F.2d 924. Accord: *Kobell v. Paperworkers*, 965 F.2d 1401 (6th Cir. 1992); *D'Amico v. Marine & Shipbuilding Workers*, 116 LRRM 2508 (D.Md. 1984).

13. Interference with access to Board processes

These cases involve employer or union retaliation against employees for having resorted to the processes of the Board, typically for filing charges or giving testimony under the Act. Such retaliation may include threats, discharges, the imposition of internal union discipline, or even the institution of groundless lawsuits meant to retaliate or harass employees for their resort to the Board's processes. Such violations are often worthy of l0(j) relief, inasmuch as the chilling impact of such misconduct may preclude other employees from filing timely charges with the Board, or from giving testimony needed in ongoing administrative proceedings. See, generally, *Humphrey v. United Credit Bureau*, 99 LRRM 3459 (D.Md. 1978). Accord: *Wilson v. Whitehall Packing Co.*, 108 LRRM 2165 (W.D.Wisc. 1980). But see *Szabo v. P.I.E.*, 878 F.2d 209 (7th Cir. 1989).

14. Segregating assets

These cases involve situations where a respondent has allegedly committed unfair labor practices which are being litigated before the Board and the ultimate Board remedy may include some measure of backpay for affected employees. During litigation, the respondent begins to close down operations and/or to liquidate its physical assets. These circumstances create a danger that, after liquidation, the respondent's assets will be dispersed and there will be no assets to satisfy the Board's backpay order. The l0(j) relief is sought to restrict the respondents alienation of assets unless or until it establishes an escrow or bond in an amount of money equal to the Region's best estimate of anticipated net backpay plus interest. See generally *Blyer v. Unitron Color Graphics of NY, Inc.*, 1998 WL 1032625 (E.D.N.Y. 1998); *Aguayo v. Chamtech Service Center*, 157 LRRM 2299 (C.D.Cal. 1997); *Jensen v. Chamtech Service Center*, 155 LRRM 2058 (C.D.Cal. 1997); *Maram v. Alle Arecibo Corp.*, 110 LRRM 2495 (D.P.R. 1982).

15. Miscellaneous

These cases involve imminent threats to statutory rights which do not fit into any of the first 14 categories. Examples of these cases may include injunctions against the prosecution of certain lawsuits, employer violence, and interference with employee activities for mutual aid and protection. See generally *Lineback v. Printpack, Inc.*, 979 F.Supp. 831 (S.D.Ind. 1997) (enjoin prosecution of alleged baseless and retaliatory Sec. 303 LMRA suit); *Sharp v. Webco Industries*, 265 F3d. 1085 (10th Cir. 2001) (enjoin prosecution of preempted State court lawsuit).

The foregoing categories are not exclusive. Cases may arise in various contexts that are not encompassed by these categories but that still warrant extraordinary injunctive relief. The common denominator for all cases in which l0(j) relief is sought is that the Board's ultimate remedial order will be unable to restore completely the status quo and, thereby, neutralize the damage caused by the violations.

Therefore, when taking a charge or investigating a case which falls within one of the above categories, or when circumstances otherwise suggest a threat of remedial failure, Board agents should be particularly alert for the potential need for 10(j) relief.

3.0 NOTICE TO PARTIES & EXPEDITION OF 10(j) CASES

As soon as it appears that 10(j) relief may be considered, the Region immediately should notify all parties of this fact and invite the parties to submit evidence and argument relevant to the 10(j) consideration. See Casehandling Manual, Part One, ULP, Section 10310.1.

Although 10(j) cases do not have statutory priority, the Agency has determined that, based upon policy considerations, any cases involving 10(j) relief should have priority over all other non-statutory priority cases in the Region (see Casehandling Manual, Part One, ULP, Sec.10310.6 and 102.94(a) Rules and Regulations). This expedition is necessary because inordinate delay in processing a 10(j) case diminishes the effectiveness of any relief obtained. Delay may entirely preclude relief where the situation has so changed that restoration of the status quo is impossible or would be no more effective than the Board's order in due course. Regions should therefore be reluctant to grant postponements to parties for production of witnesses and position statements.

4.0 INVESTIGATING AND ANALYZING "JUST AND PROPER"

As noted above, a 10(j) case differs from other unfair labor practice cases because the circumstances of the case make it likely that the Board's ultimate order will be ineffective to restore the status quo. Accordingly, when investigating an unfair labor practice charge that includes 10(j) consideration, the Board agent will determine whether there is evidence establishing a violation of the Act, but should also conduct additional investigation and analysis to determine whether a Board order in due course will be inadequate to protect statutory rights. To make these determinations, the 10(j) investigator should focus on the impact of those unfair labor practices on statutory rights. The Region should also determine the type of interim relief that is needed to preserve the status quo so that the Board can issue an effective remedy.

The quantum of evidence required to establish the need for 10(j) relief will vary depending upon the type of cases involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. Although some courts are willing to infer the irreparable injury to statutory rights from certain violations, others may require actual evidence of harm. For this reason, the existence or absence of direct evidence of impact

in a particular case is always relevant to the evaluation of the need for 10(j) relief. Its absence does not necessarily mean that 10(j) proceedings are inappropriate. But, the ability of the Regions to adduce demonstrable evidence of irreparable harm or undermining effects of the unfair labor practices increases the Board's chances for success in litigating "just and proper" issues in 10(j) proceedings.

In any case being considered for 10(j) relief, the Board agent should routinely question witnesses about the impact of the alleged violations on statutory rights, including possible "chill" on Section 7 rights, and include witness responses in their initial affidavits. In some instances, evidence of chill will be apparent from the nature of the violations, such as the discharge of a prominent activist or threats of plant closure made by high-level officials at captive audience meetings. In any event, Board agents should make every attempt to obtain both objective and subjective evidence which can be put before a district court. Objective evidence would include such things as a drop in the number of union authorization cards obtained after the onset of the unfair labor practices or a decrease in attendance at union organizing meetings. Subjective evidence is usually provided in statements given by employees, or union or employer representatives about the state of mind of employees as a result of the unfair labor practices; e.g., fear of job loss or anger at the Union. Although evidence from the affected employees is most persuasive, evidence can be obtained from another employee or union business representative to whom the affected employee expressed concern.[4] Union representatives can provide useful evidence in a variety of circumstances, such as whether a respondent's unlawful conduct has had an impact on an organizing campaign or the bargaining process.

In developing the appropriate questions, Board agents should determine whether the case falls within one of the 15 categories of 10(j) cases and consider the nature of the remedy the Region would seek in a 10(j) proceeding. These categories are discussed above in Section 2.1 and outlined in Appendix A. Board agents should then refer to Appendix B of this Manual which provides a checklist of questions designed to adduce relevant evidence as to the need for interim relief. The checklist is grouped by the types of violations alleged and is cross-referenced to the 15 10(j) categories.

If a charged party refuses to cooperate in an investigation and, as a result, the Region lacks sufficient evidence to evaluate the propriety of 10(j) relief, the Region should consider setting the case for an expedited administrative hearing within 28 days after complaint issues, in accordance with the applicable procedures.[5] After respondent produces its evidence pursuant to either procedure, the Region should reevaluate the need for 10(j) relief.

[4] See the model argument to support the use of hearsay evidence in 10(j) proceedings, in App. G-5.

[5] See Memorandum GC 94-17, *Expedited Hearings*.

4.1 Region's Evaluation of Whether to Seek 10(j) Relief

After the Region completes its 10(j) investigation, it should evaluate whether 10(j) proceedings are appropriate. In determining whether to recommend the institution of 10(j) proceedings, the Region should consider the strength of the violations as well as the threat of remedial failure. The Region should also consider the case in light of the "just and proper" theories set forth in established 10(j) case law,[6] as well as the "just and proper" evidence adduced during the Region's investigation and provided by the parties. The Region's evaluation generally should be made at the same time that it determines whether to issue complaint on the allegations in the charge(s).

4.2 Region Concludes Injunction Proceedings not Warranted

Except in circumstances where 10(j) submissions are mandatory, Regions may conclude that 10(j) proceedings should not be instituted. In those instances, it should inform the parties of its decision that injunctive relief is not warranted.

5.0 SUBMISSION OF THE 10(j) CASE TO THE BOARD

5.1 Relationship between the Unfair Labor Practice Proceeding and the 10(j) Proceeding

In considering whether to seek injunctive relief, the Region should keep in mind the relationship between the administrative proceeding and any injunction proceeding that is instituted under Section 10(j) of the Act. The statute provides that the Board may petition a district court for temporary relief "upon issuance of a complaint." Therefore, an administrative unfair labor practice complaint is a necessary predicate for seeking injunctive relief.

The Board may not seek relief in district court for a violation that is not alleged in the complaint. Similarly, the Board may not argue in district court a theory of violation that is not also being argued in the ancillary administrative proceeding. However, the converse is not true. Thus, while the violations alleged in the 10(j) petition must be alleged in the administrative complaint, it is not always necessary to seek interim relief on every violation alleged in the administrative complaint. Instead, in every 10(j) case, the Region should evaluate the unfair labor practice complaint to determine which violations must be remedied on an interim basis in order to restore the status quo. In addition, the Regions may consider omitting complaint allegations from the 10(j) petition if they are weak on the merits and not necessary to support the need for interim relief.

Regions should remain vigilant about recommending 10(j) proceedings in cases even when there are related charges still unresolved in the Region. If a case is 10(j) worthy, the Region should not wait for additional related charges to be resolved before

[6] See App. E of this Manual for a list of court cases for each 10(j) category.

submitting the original case to Washington. If those related charges are ultimately found to be meritorious and also worthy of 10(j) relief, the Region should call the Injunction Litigation Branch.[7]

5.2 Preparing the 10(j) Memorandum to the General Counsel

After the Region determines that a case has merit and believes 10(j) proceedings are appropriate, the Region makes a recommendation in writing to the General Counsel, through the Injunction Litigation Branch (ILB) of the Division of Advice, as to whether it believes that 10(j) relief is warranted. The 10(j) memorandum should be submitted to the ILB within 14 days of the merit determination. If the General Counsel agrees that 10(j) proceedings should be sought, the Region's memorandum provides the foundation for the General Counsel's request for authorization from the Board. Therefore, the Region's memorandum should contain the necessary information, analysis, and recommendations for the General Counsel and the Board to decide whether to recommend and to authorize 10(j) relief in the case.

5.2.1 Content of the 10(j) Memorandum

If the Region concludes 10(j) relief is warranted, its memorandum should detail the "merits" analysis and the analysis of the threat of remedial failure necessary to prove a 10(j) case in district court. This memorandum should set forth:

- the relevant facts and legal arguments and authorities establishing the violations, omitting analysis of minor violations
- responses to defenses raised by the respondent
- the Region's analysis including relevant facts and case law regarding why interim injunctive relief is necessary and a Board order in due course will be insufficient[8]
- responses to arguments against 10(j) raised by the respondent
- a proposed order listing specific interim remedies to be sought before the district court

[7] See Memorandum OM 01-33, *Timely Processing of Section 10(j) Case When Multiple Related Charges are Filed*.

[8] If the evidence adduced during the investigation demonstrates that the irreparable injury is imminent, the Region should consider, and explain in its memo, why a temporary restraining order (TRO) should be sought. For example, TROs are often needed where there is ongoing violence or where a respondent has immediate plans to dispose of its assets. See *Guidelines for Filing Motions for Temporary Restraining Orders Under Section 10(j)* in App. J of this Manual.

- attach a copy of the unfair labor practice complaint,[9] the answer (if filed), any 10(j) position statements submitted by the parties, and a list of counsel representing the parties

5.2.2 Resources for preparing the 10(j) Memorandum

There are several resources available to help Board agents prepare the Region's 10(j) memorandum. An outline of a model 10(j) memorandum is included in Appendix C of this Manual. In addition, the Regions may obtain copies of prior 10(j) memoranda to the Board in the ILB's research database on the Agency's Intranet. These memoranda contain arguments used in prior 10(j) cases and may have legal arguments—both on the merits and on the need for relief—that can be used in preparing the 10(j) memorandum. By searching through the ILB database with key words or by 10(j) category number (i.e., "Go 10(j)#3"), one can review and copy from the hundreds of memoranda that have issued over the years.

Also, the ILB has prepared a number of model arguments that are frequently used (i.e., need for an interim bargaining order, need for interim reinstatement, delay should not preclude injunctive relief) which are found in Appendix G of this Manual. A list of important 10(j) cases, grouped by 10(j) categories, is located in Appendix E.

While the ILB, the General Counsel, and the Board are considering the case, the Region should continue to investigate the effects of the unfair labor practices, pursue settlement, and, in cases where the likelihood of obtaining authorization to seek 10(j) relief is high, begin the preparation of the appropriate papers for filing in court.

5.3 Division of Advice Evaluation

Once the Division of Advice receives the Region's recommendation to institute 10(j) proceedings, the case is assigned to an ILB attorney for an independent review and evaluation and presented to the ILB managers for a decision. When the Division of Advice agrees with the Region's recommendation that injunctive relief is appropriate, it prepares a cover memorandum on behalf of the General Counsel which is attached to the Region's memorandum requesting injunctive relief. Together, these two documents constitute the General Counsel's request to the Board for authorization to institute 10(j) proceedings. The cover memorandum includes items not included in the Region's memorandum and necessary for the Board to make a full and reasoned evaluation of the case. Also, as discussed below, the combination of these two documents serves as a road map for the Region in ultimately preparing the appropriate papers for filing in court.

[9] The Region should not hold the 10(j) memorandum if complaint has not issued, but instead immediately forward the complaint after submitting the case to ILB.

After the General Counsel's reviews and signs ILB's cover memorandum to the Board, the entire case, including the Region's memorandum and attachments, is submitted to the Board. The ILB will also fax or transmit by electronic mail to the Region a copy of the memorandum sent to the Board. At this point, at the latest, the Region should immediately begin preparing papers to file in district court.

5.4 Inform ILB of Changed Circumstances

The Region should routinely keep the Injunction Litigation Branch updated on any new developments in cases submitted for 10(j) authorization at all stages of 10(j) processing, including after Board authorization. For example, the filing of additional charges, changes in the status of discriminatees, problems with the evidence at the ALJ hearing, issuance of an ALJ decision, or other changed circumstances could enhance or detract from the district court litigation and any appellate review of a 10(j) order.

5.5 Board Authorization, Notice to Parties, and Timing of Filing Petition; Expedition of Administrative Proceeding

If the Board authorizes Section 10(j) proceedings, the Injunction Litigation Branch will immediately notify the Region by telephone or email, and will later confirm the authorization by written memorandum. The written confirmation will attach the Solicitor's memorandum to the General Counsel which contains the votes of the Board Members. The Region should promptly (1) inform all parties of the Board's 10(j) authorization and (2) determine if an adjustment of the 10(j) case is possible.[10] The Region must file the 10(j) petition within 48 hours after notice by the ILB that the Board has authorized the use of 10(j) relief.[11] If a settlement or an adjustment is imminent, or for some other good cause, the Regional Office should consult with the ILB to seek telephonic authorization to file the petition outside the 48-hour deadline.

During the 48 hours from the authorization of 10(j) proceedings until the filing of the 10(j) court papers, settlement efforts should be vigorously pursued, both as to the 10(j) case as well as the underlying unfair labor practice proceeding. Experience demonstrates that the authorization of 10(j) proceedings is a strong catalyst for settlement of the underlying ULP case.

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[10] There can be rare situations, e.g., sequestration of assets cases, where the Region should not inform the parties of the Board's 10(j) authorization before filing its court papers. Thus, there could be cases where the 10(j) notification could prompt a response from the respondent that could moot the requested injunctive relief. The Region should obtain prior telephonic clearance from the ILB to file its court papers without prior notification to the parties.

[11] The Region will typically commence the preparation of its court papers upon receipt of a copy of the General Counsel's 10(j) Memorandum to the Board. The ILB will promptly transmit to the Region copies of the General Counsel's Memorandum by regular mail and email after the Memorandum is sent to the Board.

Where not prohibited by local court rules, the Region should seek the district court's execution of an Order to Show Cause, which schedules a prompt hearing before the court on the merits of the petition. If the court does not promptly schedule a court hearing, the Region should move the court to expedite the holding of a hearing. If the Region is unsuccessful in obtaining a prompt hearing, the Region should contact the ILB.

Upon the filing of the 10(j) papers in district court, the Region should submit a copy of all court papers to the ILB, either by hard copy regular mail or as attachments to an email.[12]

During the litigation of the 10(j) case, the Region should make all efforts to expedite the underlying administrative proceeding before the ALJ and the Board. Upon the issuance of the district court's 10(j) order, granting injunctive relief in whole or in part, the Region should move the ALJ or the Board to expedite the underlying ULP case consistent with Section 102.94(a) of the Board's Rules and Regulations.[13]

6.0 PREPARING 10(j) PAPERS FOR DISTRICT COURT

As mentioned above, the Region must file the 10(j) petition in district court within 48 hours after notice by the ILB that the Board has authorized the use of Section 10(j). The typical documents to be filed in the U.S. District Court include:

- Petition for Injunctive Relief (attach charge, complaint and Regional Director's affidavit)
- Proposed Order to Show Cause
- Memorandum of Points and Authorities
- Proposed Findings of Fact and Conclusions of Law
- Proposed Temporary Injunction Order (should track the 10(j) memo to Board)

Examples of these basic pleadings, as well as others that may be applicable (i.e, a sample motion for a Temporary Restraining Order) are included in Appendix H of this Manual.[14]

The Region should always check the local district court rules to determine the procedures that should be followed in filing the papers. These rules can be obtained from Westlaw, and some courts maintain their own website containing the rules and other

[12] If the court papers contain a large number of exhibits, the Region can limit its submission to the ILB to the 10(j) petition and the memorandum of points and authorities.

[13] See also the 10(j) Manual, at Sec. 9.1, regarding the impact of ALJDs upon ongoing 10(j) proceedings.

[14] If the Board has authorized a 10(j) protective order to sequester assets, refer to App. I for samples of the model pleadings.

pertinent information. It may be helpful to contact attorneys in the area who are well practiced in civil litigation to help explain the vagaries of the local district court. It could also prove worthwhile to telephone the court and establish contact with someone in the clerk's office who can provide help on some of these procedural matters.

In preparing the papers for filing, the Region should ensure that the court is made aware at the outset that the Board's 10(j) petition should be given expedited treatment under 28 U.S.C. § 1657(a) (gives priority to preliminary injunction cases in Federal courts). Typically, this may be accomplished by indicating in the cover letter accompanying the filing of the court papers that treatment of the case is governed by Section 1657(a).

6.1 The Evidence

The Region should decide how to make or place an evidentiary record before the district court judge. The Region's evidence should support both its petition allegations on the merits of the case, as well as the petition allegations on the propriety of granting injunctive relief. Some district courts permit or require the Board to litigate 10(j) cases purely on affidavits. In those circumstances, check with the district court or judge's law clerk as to when the affidavits should be filed in court. The Region should then prepare for filing with the court a volume of the affidavits and exhibits upon which it intends to rely.

In some cases, a record already compiled in the administrative proceeding before an administrative law judge (or relevant portions thereof) can be used in place of, or in conjunction with, affidavits. The administrative record will generally only support the merits of the violations, and not the need for injunctive relief. For this reason, 10(j) cases heard on the administrative record also will need supplementary evidence on the need for interim relief either in the form of affidavits or live testimony before the district court judge.

In either event, unless the district court has approved as a general rule the use of affidavits or administrative transcripts in 10(j) proceedings,[15] the Region should file a motion to hear the case on affidavits or the administrative record. This, preferably, should be filed simultaneously with the petition. Sample motions and a model memorandum to support such motions are contained in Appendix K of this Manual. In some instances, a district court will insist on hearing live testimony to prove the violations or just and proper allegations in the petition. In that case, the Region should be prepared to present witnesses at a 10(j) hearing in district court to prove the merits of the petition allegations.

[15] For example, district courts in the Ninth Circuit require preliminary injunction cases to be tried on affidavits as a matter of course.

6.2 The Memorandum of Points and Authorities

In preparing the Memorandum of Points and Authorities, the Region should keep in mind that the district court judge or magistrate is unlikely to be as familiar with labor law principles as an administrative law judge. Thus, the Board's memorandum in support of the Petition for Injunctive Relief should lay out a theory of violation in greater detail than the Region is likely to do in its administrative litigation, and should avoid labor law jargon.

The Region's memorandum regarding 10(j) relief and the General Counsel's memorandum to the Board serve as a blueprint for the district court petition and brief and a repository of solutions for anticipated litigation problems in the particular case. The Region is not expected to perform additional research to prepare its court papers. Rather, the Region should rely upon these two documents, together with other resources, such as the Model 10(j) standards in Appendix D, the list of important 10(j) cases in Appendix E, sample arguments in Appendix G, and sample 10(j) pleadings in Appendix H, to draft papers in appropriate format for the district court. In addition, the attorney should review prior memoranda of points and authorities in support of a 10(j) petition to obtain the proper format for drafting the memorandum.

Basically, every memorandum of points and authorities should include, in the following order:

- an introduction to the case which describes briefly the nature of the case and why the Board is before the court
- an overview of the statutory scheme of Section 10(j) of the Act
- the applicable 10(j) standard that should be applied in the case
- a chronological narrative containing the facts of the case, including all facts necessary to support the allegations in the petition and the need for relief, with annotations referring to any attached affidavits
- an analysis of how the facts support each of the violations alleged in the petition (applying either the "reasonable cause" or "likelihood of success" test), with citation to applicable Board and court authority
- a description of the specific relief the Board is seeking, together with an analysis of why that relief is needed in the case, relying upon, where available, evidence of the impact of the violations
- a conclusion

If sample memoranda of points and authority are unavailable in the Regional Office, the Region can request samples from the Injunction Litigation Branch. A listing of recommended samples available from ILB is located in Appendix F of this Manual. In

addition, special instructions and model arguments for briefing *Gissel* 10(j) cases are located in Appendix G-2 of this Manual.

The respondent is afforded the opportunity to file answering papers and, where relevant, counter-affidavits and exhibits. The Region may need to file a reply brief and rebuttal affidavits and exhibits to answer unanticipated arguments raised by the respondent. Check the local district court rules to determine whether these are permitted as a matter of course or by motion.

7.0 ORAL ARGUMENT IN DISTRICT COURT

Once the Region files the initial 10(j) papers in district court, the case will be assigned to a judge who should schedule a hearing.[16] As shown in the following sections, numerous resources are available to assist Board attorneys in their preparation to argue before a Federal district court judge. In addition to these resources, the Injunction Litigation Branch is available at all times to provide additional guidance and support as the 10(j) hearing approaches.

7.1 Preparation for the 10(j) Hearing

Unless the court has specifically limited the issues to be addressed at hearing, the Board attorney should be prepared to address all aspects of the 10(j) case. In most instances, the Region will have filed with its initial papers a motion to either hear the case on affidavits or on the ALJ transcript. If the court has granted the motion, than it is doubtful that there will be any need to present live testimony on the merits of the unfair labor practice allegations. However, it may be advisable for Board counsel to prepare and bring to the hearing at least one key witness since it is within the court's discretion to ask for live testimony at any time.

On the other hand, it is also possible that the court will not have ruled on the motion, even as the hearing date approaches. In that event, the Board attorney should contact the judge's clerk and attempt to get a ruling on the motion prior to the hearing, or at least get a sense of which issues the court anticipates addressing during the hearing. If, at the time of the hearing, the court has still not ruled on the outstanding motion to try the case on either affidavits or ALJ record, than the Board attorney should be prepared to put on a full evidentiary hearing on both the merits of the unfair labor practice allegations as well as the need for injunctive relief.

Generally, however, the district court hearing is nonevidentiary, providing an opportunity to present oral arguments in support of the petition. The Board attorney should be prepared to argue all the affirmative elements of the case. Typically, these include the standard to be applied by the court for deciding whether to grant injunctive relief, the low burden of proof on the merits, the merits themselves (applying either the

[16] If the judge does not set a date for a hearing after 30 days from the filing of the petition, refer to sec. 9.2 on District Court Delay in Issuing 10(j) Decision regarding how to proceed.

"reasonable cause" or "likelihood of success standards), and why injunctive relief is necessary in the case before the court. In addition, the Board attorney should address the defenses which respondent may have raised in its opposition memorandum.

In preparation for the district court hearing, the Board attorney should review "Questions By The Court and Possible Answers in Section 10(j) Proceedings" which is found in Appendix L of this Manual. This document lists questions which are frequently asked by judges in district court proceedings. As the list evinces, among the most common concerns of a judge presiding over a 10(j) hearing are (1) whether injunctive relief is truly needed, and (2) whether the Board has taken too long in getting the case before the court. The suggested answers will provide guidance on how to address these concerns.

There are certain steps the Board attorney should take prior to the hearing to help address these preeminent concerns of the district court. First, the Board attorney should notify the ALJ assigned to the case that 10(j) relief has been sought, and request expedited treatment of the unfair labor practice case. Having accomplished this task, Board counsel can fairly report to the judge that the Board has done everything possible to expedite the case. In this vein, the Board attorney should avoid and oppose any delay in the administrative hearing—trial postponements and extensions for filing briefs can indicate a lack of urgency. Second, the Board attorney should confirm prior to the hearing that any discriminatees involved in the case still desire reinstatement. It would be awkward to argue before the court about the need for reinstatement, only to have respondent counter that the discriminatee is no longer interested in reinstatement.

7.2 Charging Party Intervention

Occasionally, a charging party may wish to intervene as a party in the 10(j) proceeding. Board counsel should oppose any effort by the charging party to intervene.[17] Instead, the Region should support amicus status for the charging party. If possible, this matter can be handled informally between the parties. However, if the charging party files a motion for intervention in district court, the Region should oppose that motion and support amicus status at that time. A sample argument to support a motion to oppose intervention is in Appendix M of this Manual.

7.3 Moot Court

A moot court session prior to a district court hearing may be advisable. A moot court provides the Board attorney with a greater level of familiarity and experience articulating the arguments. It also provides exposure to another point of view. Board attorneys can arrange a moot court with the supervisors or managers in their Regional

[17] See Memorandum GC 99-4, *Participation by Charging Parties in Section 10(j) Injunction and Section 10(j) Contempt Proceedings,* located in App. M of this Manual.

Office. In addition, the ILB is available to conduct a moot court session, either by telephone or via the Agency's video conferencing equipment.

7.4 At the District Court Hearing or Oral Argument

Here are some general points to review before a district court hearing or oral argument:

A. Review most common questions asked by courts in 10(j) proceedings (App. L)

B. Be ready to explain why injunctive relief is needed in this case. Know the "hook" (the essence or the critical aspect of the case) and keep the court focused on this point.

   1. Judges are primarily looking for a concrete explanation of irreparable harm.

   2. Argue the facts. Don't be vague or too general.

   3. Don't use labor law "buzz words" because the district court is not familiar with NLRA law.

C. Argue the Board's affirmative case before addressing any defenses raised by respondent.

D. Don't assume that the judge is hostile just because he/she asks questions; the court may be honestly confused and seeking guidance. A large part of the Board attorney's job is to educate the court.

E. If a question appears irrelevant or nonsensical, consider how the judge may be confused. Counsel for the Board may have to give a brief explanation of some labor law principle or ask the judge to repeat the question.

F. Develop the evidentiary record. Don't accept the judge's statement that affidavits need not be submitted into evidence. If the judge refuses to accept any evidence, then the Board attorney should make an offer of proof and place the evidence in a rejected exhibit file.

G. Get the court's ruling on any outstanding motions at the hearing.

H. Have a proposed order ready for the judge's signature (even if one was submitted with the 10(j) petition).

I. Questions about Board delay (see also App. G-5)

   1. Mention the actual timetable in which charges were filed, complaints issued, etc., to explain why due process (full investigation including opportunity for charged party to respond, before complaint issues) and

statutory requirements (e.g., complaint must issue before petition can be filed) are inevitably time-consuming.

2. Don't be defensive and don't concede that the Board has delayed. Point out to the court, if necessary, that a 3-6-month passage of time is normal due to the administrative process and that district courts have granted injunctions after up to 14 months.

3. Try to shift the court's focus from the delay itself to a focus on whether so much time has passed that an injunction will be no more effective than a Board order.

   (a) Mention any evidence that shows that the situation can still be remedied effectively if prompt action is taken.

   (b) For example, emphasize that a core of employee supporters is still willing to revive the campaign or that a union leader is ready to go back and resume organizing.

4. Be ready to argue how the passage of time has not been unreasonable. E.g., there have been continuing violations and successive charges; amended complaints; respondent contributed to delay; the Region waited for election results, an ALJ record, or the outcome of settlement discussions

J. Questions about administrative schedule:

1. Be prepared to give specific answers about the procedural history of the case: when trial will begin, if it has started, how far along it is, when were charges filed, when complaint issued, etc.

2. Courts are sometimes confused about the meaning of an ALJ decision versus a final Board order. Ensure that the court understands that interim relief is meant to cover the period until a final Board order, not just the start or end of the ALJ trial or ALJD.

3. Don't make any promises or predictions about when the ALJ or the Board will issue their decisions. Don't promise that there will be no delays, but emphasize that the General Counsel will make every effort to expedite the case (e.g., notify the ALJ and Board that the case involves the need for 10(j) relief).

8.0 DISCOVERY IN 10(j) LITIGATION

The Board does not initiate discovery in 10(j) proceedings because discovery inevitably delays the injunction proceeding. In addition, in 10(j) cases, the Board has a limited burden to prove only reasonable cause/likelihood of success on the merits.

Investigatory affidavits or the record of the administrative trial, plus "just and proper" evidence obtained in the investigation, are generally sufficient for the Board to meet its burden. Thus, there is rarely a need for the Board to conduct discovery in injunction cases.

Respondents, however, often seek discovery. Courts frequently grant discovery because, despite the priority nature of Section 10(j) cases, the Board is subject to normal discovery procedures under the Federal Rules of Civil Procedure (Rules 26-37 and 45) in a district court proceeding. Board attorneys should be prepared to respond to reasonable discovery requests and to produce relevant, nonprivileged evidence. These guidelines are designed to assist Board attorneys in responding to discovery requests by:

- setting forth the primary Agency objectives in handling discovery requests;
- summarizing how Regional Offices should deal with several general types of requested discovery material; and
- providing examples of strategies successfully used in the past to effectively respond to discovery requests while controlling the scope of discovered information.

Board attorneys should read these guidelines in conjunction with the *Model Memorandum of Points and Authorities in Support of a Motion for a Protective Order to Limit Discovery Pursuant to Fed.R.Civ.P. 26(c)(1)* (Model Memorandum), in Appendix N of this Manual. The Model Memorandum supplements the legal issues outlined here with more comprehensive arguments and citation to case authority.[18] In addition, Board attorneys should read the following reported decisions involving discovery in 10(j) and 10(l) cases, as they further explicate the issues discussed here: *NLRB v. Building Trades Council of Philadelphia*, 131 LRRM 2022 (3d Cir. 1989) (special master); *U.S. v. Electro-Voice, Inc.*, 879 F.Supp. 919 (N.D.Ind. 1995); *D'Amico v. Cox Creek Refining Co.*, 126 F.R.D. 501 (D.Md. 1989).

The Region should immediately contact the Injunction Litigation Branch whenever it receives a discovery request in a Section 10(j) case.

8.1 Discovery Objectives

When faced with a discovery request, the Board's primary objectives are three-fold:

[18] Appropriate portions of the Model Memorandum should be filed in support of a motion to limit discovery. A model motion and order limiting discovery are also in App. N of this Manual. **Note that the Model Memorandum discusses numerous types of discovery problems that arise in 10(j) proceedings; therefore, a Region should be careful to use only those parts of the Memorandum, Model Motion, and Model Order which concern its particular discovery request.**

- to expedite the discovery process and not unduly delay the 10(j) hearing on the merits of the petition;

- to safeguard the Board's internal decisionmaking or deliberative processes; and

- to protect the employee witnesses who assist the Board in its investigations and who could be subjected to retaliation because of their testimony.

The Regions can implement these objectives by recognizing that the Agency has an affirmative duty to promptly respond to a respondent's legitimate need for relevant evidence in the Board's possession within the meaning of Fed.R.Civ.P. 26(b)(1).[19] On the other hand, where a respondent's request seeks either irrelevant or privileged Agency documents or testimony, the Region should promptly move the court to strike such request, via a motion under Rule 26(c)(1) for a protective order to limit discovery. Where there is also a danger that the production of otherwise privileged employee affidavits, witness lists or union authorization cards could lead to a respondent's retaliation against the witness or card signers before entry of a 10(j) decree,[20] consideration must be given to securing protection for these witnesses via an appropriate Rule 26(c) motion.[21] The Region should also seek to stay a respondent's discovery request until the court passes upon the Region's motion for a protective order.

Also note that, pursuant to Rule 26(c), the movant must supply a "certification" that he has "in good faith conferred" with the opposing party in an effort to resolve the discovery dispute. Thus, the Region should give prior notice to the respondent regarding its position on the discovery issues and, if it cannot resolve the conflict, it can then supply the necessary certification required under Rule 26(c). Thus, as discussed further at Section 8.3, infra, the Region should give prior notice to the respondent regarding its position on the discovery issues so that if it cannot resolve discovery conflicts, it can then supply the necessary certification required under Rule 26(c). At the same time, the Region should try to negotiate an agreement to limit and expedite discovery. For example, respondent and the Region can agree that a request for production of

[19] Effective December 1, 2000, Fed.R.Civ.P. 26(b)(1) has been limited somewhat to provide for discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Previously, this rule permitted discovery of any nonprivileged matter "relevant to the subject matter involved in the pending action." Although the case law interpreting this amendment is in the early stages of development, the Region should, where appropriate, argue that certain matters are not discoverable under the new standard. See *Thompson v. Dept. of Housing & Urban Development*, 199 F.R.D. 168, 171, 173 (D.Md. 2001).

[20] This possibility is most likely where the respondent has already engaged in 8(a)(3) discrimination.

[21] See Model Motion for a Protective Order to Limit Discovery Pursuant to Fed.R.Civ.P. 26(c)(1) at App. N.1.

correspondence does not include routine, nonsubstantive correspondence, such as scheduling notices and certain form letters. Such agreements can lighten the burden on the Region of responding to voluminous discovery requests. The Region should document in writing any discovery agreements or disagreements.

8.2 Types of Discovery Requests

The Board is generally faced with discovery requests for the following three types of information:

A. Requests for production of documents, interrogatories, or notice of deposition of the Regional Director or other Agency personnel regarding internal Agency communications, memoranda, and investigative documents.[22]

B. Requests for information regarding the evidence adduced during the Region's investigation. This may be in the form of a request for production of documents such as witness affidavits, union authorization cards, documentary evidence and exhibits contained in the Regional Office investigatory file. Such a request may cover not only evidence upon which the Board relies in support of its 10(j) petition, but also may cover evidence which the Board does not intend to use in the injunction proceeding. It may also cover non-Board affidavits, position statements, and other documents prepared by the charging party rather than the Board agent. A respondent may also seek information about the Board's case in the form of a notice to depose the Board's witnesses or in the form of interrogatories.

C. Requests for production of documents, interrogatories or notices of deposition regarding the scope of the investigation, other 10(j) litigation and/or statistical information concerning numbers and types of unfair labor practice complaints issued by the General Counsel and similar injunctive proceedings initiated by the Board.

The scope of the Board's disclosure will vary according to the level of protection attached to the material sought by respondents, either under the relevancy requirement of the Federal Rules[23] or a valid qualified privilege exception.[24] Thus, when faced with a discovery request, the Region should carefully examine the requested information in light of the above-discovery objectives, and generally respond with a motion for a protective order under Fed.R.Civ.P. 26(c) to limit discovery. The request for a protective order will be based on one or more of the following arguments.

[22] E.g., Board personnel's notes to the file, FIRs, Agenda Minutes, Region's 10(j) memorandum to Advice, the General Counsel's 10(j) Memorandum to the Board, ILB litigation advice memos to the Region, etc.

[23] See Rule 26(b)(1).

[24] See Rule 26(b)(5).

A. Internal Agency communications, memoranda, and investigative documents and/or deposition testimony of Board personnel

1. Internal memoranda and privileged communications between the Regional Offices, the General Counsel and/or the Board

The Board consistently opposes such discovery requests. The Region should argue in its request for a protective order that these documents (1) are not relevant in a 10(j) proceeding because the determination of whether there is "reasonable cause" or "a likelihood of success on the merits," and the assessment of the propriety of injunctive relief, should by made by the district court based on the pleadings and evidence presented, not on the Board's or the General Counsel's mental processes or deliberations; and (2) are also exempt from disclosure by the attorney-client privilege, the attorney work-product privilege, and the internal Agency deliberations privilege.[25]

2. Deposition testimony of the Regional Director and/or other Agency personnel

If a respondent notices the Regional Director or other Agency personnel for deposition, the Region should generally file a motion for a protective order under Rule 26(c) to quash any such request. In our view, as discussed below, these individuals, as government officials, have no personal knowledge of any of the facts in the case.[26] And, to the extent such a discovery request seeks to inquire into internal Agency thought processes or the official conduct of the Agency's officials, it is not relevant to the limited legal issues before the court, and the information sought is protected by the deliberative process privilege.[27]

3. Discovery aimed at the factual basis for allegations in the petition

The foregoing discussion covers a discovery request for documents or testimony of Board personnel regarding the Agency's decision to file a 10(j) petition. Different considerations apply to a notice to depose a Regional Director regarding the facts on which he or she relies to support particular allegations of the 10(j) petition, including allegations regarding the need for interim relief. A respondent likely can establish that identification of the factual foundation of the petition is relevant to its defense to the allegations in the petition. Nevertheless, a Regional Director's deposition regarding the

[25] Id.

[26] Compare *Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D.Mass. 1990) (exception for general rule against testimony of government officials where official had personal knowledge pertaining to material issue in action).

[27] See Model Motion to Quash Notice of Deposiiton Pursuant to Fed.R.Civ.P. 26(c)(1) at App. N 4.

violations alleged in the petition would almost necessarily disclose his or her analysis of the evidence, legal theories, and opinions. Therefore, when a respondent notices a Regional Director for a deposition to discover these facts, the Region should resist such discovery because it will implicate the attorney-work product privilege and there are other, less intrusive, means to discover the information.

Of course, the facts supporting the 10(j) petition are likely among the facts the Regional Director considered as part of prepetition deliberations. As discussed above, however, we would resist as irrelevant, discovery of those same facts if they were requested to discover what the Regional Director (or others in the Agency) considered or relied upon in deciding whether to file the petition. For that inquiry is not relevant and implicates the deliberative process. *NLRB v. Trades Council*, 131 LRRM at 2023-2024, 1997 WL 120572 (deliberative process privilege); *United States v. AT&T*, 524 F.Supp. 1381, 1387-1388 (D. D.C. 1981) (irrelevant and privileged).

Thus, the Region should move to quash any such notice of deposition. It should first argue that respondents have alternative means to acquire the information sought, including reliance on the legal analysis and record references in the Region's memorandum of law in support of the petition, on the evidentiary record presented by the Board, and discovery of non-Board personnel with personal knowledge of events. It should further argue that depositions of Board personnel will implicate privilege concerns. Finally, in some circumstances the Region can argue that if any discovery of the Board on the information sought is to be allowed, the more appropriate means would be to propound interrogatories that will be answered by the Board attorneys who are more familiar with the petition and the record evidence than is the Regional Director. The Region should consult with the ILB to determine whether this response would be appropriate.

4. How to proceed if a motion to quash a deposition is denied

If the district court denies the Board's motion to quash the notice of deposition, the Regional Director (or other witness) must appear for deposition. We would not, however, view the denial of a motion to quash as precluding the Board from claiming that individual questions are subject to a specific claim of privilege or lack of relevancy. Thus, if counsel for the respondent asks a question that is not relevant, counsel for the petitioner should object on those grounds, but the witness will have to answer the question. On the other hand, if questions asked at the deposition raise privilege claims, Board counsel should object and direct the witness not to answer the question.

The Region should always consult with the Injunction Litigation Branch regarding strategy prior to any deposition. The ILB may be able to provide sample questions and answers in anticipation of the deposition.

B. Witness affidavits, documentary evidence, and exhibits contained in Regional Office investigatory file

1. Affidavits of witnesses whom the Region plans to call in the 10(j) hearing and other documentary evidence relied upon by the Board in its petition

The Model Memorandum sets forth an Agency position that witness affidavits are subject to a qualified attorney work-product privilege.[28] However, since the evidence contained in these affidavits is almost always relevant under Rule 26(b)(1), and since the Board desires to expedite the discovery process, it may be advantageous to waive the privilege as to investigatory affidavits of witnesses on whose testimony the Region intends to rely at the hearing. Thus, where it would terminate and completely satisfy a respondent's discovery request, the Region may offer to transmit to a respondent copies of all witness affidavits as well as other relevant documentary evidence and exhibits in the Agency's possession which are intended to be used in the 10(j) proceeding.[29] This information should be quite sufficient to enable the respondent to adequately prepare its defense in the 10(j) proceeding.

If the respondent is unwilling to terminate discovery even with the Board's offer to produce such material, i.e., the respondent wants to depose the witnesses, or require the answers to interrogatories, or is insisting upon the production of privileged information, a different response is necessary. The Region should first move to stay all discovery until the court passes upon the Board's motion for a protective order to limit discovery. The Region should argue to the court that, in light of the Board's willingness to proffer certain information to the respondent, additional discovery would serve no useful purpose in the 10(j) proceeding and would only delay the hearing on the merits of the petition. The Region should raise the standard 10(j) argument in these cases that, given the Board's limited burden of proof, the court would be acting well within its discretion to limit and expedite the discovery process in this type of ancillary injunction proceeding.[30]

We have often been successful in limiting discovery in this fashion. This is, however, a matter within the discretion of the district court. If the court denies our motion to limit discovery, the Region generally will have to comply with the discovery order.[31] The Region should consult with the ILB regarding developments in discovery litigation.

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[28] See Model Memorandum in Support of Motion for Protective Order to Limit Discovery Pursuant to Fed.R.Civ.P. 26(c)(1) at App. N 3.

[29] Id.

[30] Id.

[31] Discovery orders are not immediately appealable. The only way to obtain review of a discovery order is to refuse to comply and accept dismissal of the petition as a sanction for failing to comply with a discovery order. We can then appeal from the dismissal of the petition. We have taken this route on rare occasions

In some cases, the Region may have reason to believe that the identification either of Board witnesses or union card signers who are still employed by a respondent may result in retaliation against them. The Region should file a motion for a protective order to prohibit retaliation and to limit the scope of the disclosure of evidence turned over.[32]

2. Affidavits of witnesses in the Regional Office investigatory file upon which the Board did <u>not</u> rely in the petition and does <u>not</u> intend to call as witnesses at the hearing

In its request for a protective order, the Region should argue that this information does not have to be produced for discovery, as it falls under the attorney work-product privilege.[33] Rule 26(b)(3) establishes a qualified immunity from discovery for attorney work-product. Under Rule 26(b)(3), absent a respondent's showing that it has a "substantial need of the materials" and that it is "unable without due hardship to obtain the substantial equivalent of the material by other means," privileged information is not discoverable. The Board is not obliged to provide the respondent with exculpatory material which falls within the attorney work-product privilege.[34]

The Board may also be requested to produce relevant documents in the case file that were received from outside sources during the investigation (i.e., documents not generated by a Board agent), even if those documents will not be used at trial. These may encompass non-Board witness affidavits and charging party position statements. There is no 10(j) precedent regarding the Board's obligation to produce these documents. However, it may be argued that the charging party in a 10(j) case is an allied party that shares common interests with the Board and that the Board need not produce the work product of its litigation "ally." See, e.g., *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984) (plaintiff did not waive privilege by sharing work product with EEOC in joint actions against defendant; district court order that EEOC produce documents received was overturned); *U.S. v. A.T. & T. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (work product privilege not waived where party gave information to a government agency); *Information Resources, Inc. v. Dunn & Bradstreet Corp.*, 999 F.Supp. 591, 591-592 (S.D.N.Y. 1998), and cases cited therein (work product privilege not waived when product shared with allied party).

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rather than expose the Board's deliberative processes to discovery. It is, however, an option to be exercised only in extreme circumstances.

[32] See Model Motion to Quash Notice of Deposiiton Pursuant to Fed.R.Civ.P. 26(c)(1) at App. N 4.

[33] See Model Memorandum in Support of Motion for Protective Order to Limit Discovery Pursuant to Fed.R.Civ.P. 26(c)(1) at App. N 3.

[34] Id.

The Region should also argue that the Government's informer's privilege protects from disclosure affidavits of witnesses whose testimony will not be used in the 10(j) proceeding. The informer's privilege is the Government's privilege to withhold from discovery the identity of persons who furnish information regarding violations of the law to those officials who are charged with enforcement of the law at issue. The privilege may be invoked in civil cases, including Board proceedings.[35]

The informer's privilege is a qualified privilege which must be balanced in each case with fundamental requirements of fairness; where the party seeking disclosure fails to make a sufficient showing of necessity, the court properly denies disclosure. In Board injunction proceedings, unless the Board intends to call an affiant as a witness or to rely upon the affiant's affidavit as evidence supporting the petition, fairness concerns are not implicated because the Government is not using the evidence produced by the unknown informer. Courts will not permit the informer's privilege to be overcome where the identity request is seen as a mere "fishing expedition" or where based upon mere speculation that the information could be useful to the respondent.[36]

C. Scope of Agency investigation, Agency 10(j) statistics, or names of other 10(j) cases

1. Adequacy of the Regional Office's investigation of the case

The Board consistently opposes discovery regarding the scope and adequacy of the Board's investigation or whether the Agency in Washington was presented with all available evidence or legal arguments. Such issues clearly are not relevant to a district court's limited inquiry in a Section l0(l) or l0(j) proceeding.[37]

Similarly, to the extent that a respondent seeks discovery regarding matters which arguably involve allegations of selective or malicious prosecution on the part of the Regional Office, the General Counsel, or the Board itself, it is clear that such matters are not generally relevant under Rule 26(b)(1) and should properly be the subject of a limiting protective order under Rule 26(c)(l). The Region should argue that such issues are not relevant absent a showing that respondent has carried a "heavy burden" of proving prima facie that the Agency's 10(j) prosecution has been based upon improper motivations. Further, such information would serve no useful purpose, would unduly delay the hearing, and would improperly require the production of privileged materials involving internal policy or litigation deliberations of a government agency.

[35] Id.

[36] Id.

[37] Id.

2. Statistical information on the number and types of unfair labor practice complaints issued by the Regional Director and/or Agency in a given period of time and types of other 10(j) proceedings initiated by the Board

The Board consistently opposes these requests. The courts have generally denied attempts by parties to discover such statistics or the names of other lawsuits involving the other party under a relevancy standard.[38]

8.3 Successful Strategies for Carrying Out Board's Discovery Objectives

A. As described above, although the Board has a substantial claim of attorney work-product privilege as to Board witness affidavits, we believe it can often expedite the discovery process, allow a prompt 10(j) hearing, and be less disruptive to the Board's witnesses, to produce these documents in discovery in lieu of subjecting these witnesses to formal depositions. If the Region can obtain a commitment from respondent's counsel that these individuals will not be deposed, as a quid pro quo for disclosure of their Board affidavits, it should produce the documents and thus waive the Board's work-product privilege.

B. Where the underlying unfair labor practice proceeding has been or will soon be litigated administratively, discovery on the issues of "reasonable cause" or "likelihood of success on the merits" can be obviated by use of the ULP transcript as the "merits" record in the district court. Thus, where the ULP hearing has already closed or will soon be litigated, the Region should move the court to utilize the ALJ transcript for all "merits" issues.[39] The Region should also move the court to stay any discovery requests until the court passes upon the Board's motion to use the ALJ transcript. Specifically, the Region should argue that the district court should accept the ULP transcript and preclude discovery as to the "reasonable cause" or "likelihood of success" element of the 10(j) case. Since the question before the court on this issue is whether the *Board* is likely to find a violation, the court should refer solely to the record adduced before the Board and not allow the introduction of any extraneous material not adduced before the Board.[40]

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[38] See Model Memorandum,App. N 3 at III(D).

[39] See App. K of this Manual (*Sample Motions & Memoranda to Hear 10(j) Case on Affidavits or ALJ Transcript*).

[40] Once the ALJ record has closed, the Board will not consider any other evidence for its administrative adjudication, consistent with the Administrative Procedure Act, 5 U.S.C. § 556(e). See *Innovative Communications Corp.*, 333 NLRB 665, 665 fn. 2 (2001) (sustaining a motion to strike proffered documents pertaining to 10(j) district court proceedings, where the documents had not been made part of the official record in the administrative unfair labor practice case).

Accordingly, the Region should argue that discoverable information should be strictly limited to the "just and proper" inquiry because that evidence probably would not be included in the ULP record.

C. Where the allegations of a petition reveal serious violations by a respondent aimed at individual employees, the Region must be particularly sensitive to a respondent's use of employee affidavits, witness lists, union authorization cards, and its depositions of employee witnesses. In such cases, as soon as the discovery request is made, and *before* any witness or document is produced, the Region should seek to condition any proffer of witness affidavits, union cards or deposition with a protective order to ensure that these persons are free from possible retaliation or harassment prior to the 10(j) trial or administrative hearing. Thus, the Region should promptly file a motion to stay the discovery request until the court passes upon the Board's motion for a protective order, see footnotes 14 and 15 and accompanying text, supra, to protect the individual employee witnesses or card signers whose affidavits or names will be submitted to the respondent.

We recognize that this list of strategies could expand as Regional Offices continue to respond to discovery requests in their 10(j) cases. Each case must be considered on its own facts, keeping in mind the primary objectives of the Board discussed above.

9.0 OTHER LITIGATION ISSUES

9.1 Impact of ALJD on 10(j) Litigation

Frequently, an ALJ issues a decision in an unfair labor practice case when there is a related 10(j) petition pending before a district court. In that event, the Board attorney should review the ALJD and determine whether the ALJ's findings support or undercut the allegations in the 10(j) petition. The Region should also immediately notify the Injunction Litigation Branch of the issuance of the ALJD.

A favorable ALJD supports the Board's effort to convince a district court judge that there is either "reasonable cause" to believe respondent violated the Act as alleged in the 10(j) petition, or that there is a "likelihood of success" in proving the violations before the Board. Therefore, if the ALJ's findings support the 10(j) petition allegations, then the Region should submit a copy of the ALJ's decision to the district court judge who is presiding over the 10(j) petition. The Region should send a cover letter which explains how the ALJ's decision supports the 10(j) petition. A proposed cover letter, with relevant arguments and case citation, is included in Appendix O of this Manual.

In the event of an adverse ruling by an ALJ, Board Rule 102.94(b) requires notification of the district court. Therefore, if the ALJ recommends dismissal of some or all of the complaint allegations which are contained in the 10(j) petition, the Region should immediately notify the ILB. The Region should evaluate the impact of the ALJ's decision on the critical allegations contained in the 10(j) petition and should consider the viability of proceeding with the 10(j) litigation in district court in the face of an adverse

ALJ decision. This determination will be based, in part, on whether the Region will take exceptions to the ALJ's adverse rulings. The Region should then make a prompt recommendation to the Injunction Litigation Branch as to whether or not to withdraw the 10(j) petition or, at least, the losing allegations.

9.2 District Court Delay in Issuing 10(j) Decision

The Board authorizes the use of injunction proceedings when immediate interim relief is needed to preserve the effectiveness of the Board's ultimate remedial order. For this reason, time is always of the essence in a 10(j) case. Just as the Agency makes every effort to expedite internal agency processes in every 10(j) case, the district court also should act quickly to resolve the 10(j) petition.

For this reason, the Region should be prepared to take action if it does not receive a prompt decision from a district court judge. Specifically, if a district court fails to issue a decision within 30 days after the close of the 10(j) hearing or the last court filing, the Region should contact the judge's clerk directly to determine the status of the case. If necessary, the Region may need to send a letter or move to expedite the case. In extreme circumstances, the ILB can file a petition for a writ of mandamus in the court of appeals to compel the district court to rule on the 10(j) petition. A complete timeline, with comprehensive instructions and model papers for obtaining a prompt 10(j) decision from a district court, are located in Appendix P of this Manual. The Region should keep ILB apprised of all developments concerning expediting the 10(j) decision

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9.3 Withdrawal or Dismissal of the 10(j) Petition

For various reasons, it may be necessary for the Region to consider withdrawing or seeking dismissal the 10(j) petition while it is pending in district court and before the court issues a decision. This may occur if the parties have settled the underlying labor dispute, or if there are other changed circumstances which render injunctive relief no longer appropriate. The 10(j) petition should not be withdrawn or dismissed, however, without the Region first conferring with the Injunction Litigation Branch.

10.0 POST INJUNCTION PROCEDURES

A number of issues may arise after a district court issues a decision either granting or denying the Board's 10(j) petition. As always, the Region should immediately inform the Injunction Litigation Branch of the issuance of a district court's decision in any 10(j) matter, and promptly send by facsimile transmission a copy of the 10(j) decision or order. However, the granting or denial of a 10(j) injunction is not the end of a 10(j) case. Whether the decision is a win or a loss, the Board attorney should be aware of a number of issues may arise.

10.1 Notification to the ALJ or the Board

Depending on the stage of the administrative proceeding, the Region must notify either the presiding ALJ or the Board whenever a district court issues an 10(j) injunction in a pending unfair labor practice case and request that the case be expedited. Section 102.94(a) of the Board's Rules and Regulations requires that the Board give expedited treatment to any complaint which is the basis for interim injunctive relief.

10.2 Modification or Clarification of 10(j) Order

When a district court issues an order granting interim injunctive relief under Section 10(j) of the Act, the Region immediately should determine whether the relief granted differs from that which was requested in the 10(j) petition. If the relief granted does not exactly track the language of the petition and the proposed 10(j) order, the Region should determine whether the relief obtained is clear, capable of compliance, and provides the relief necessary to restore the status quo. If the order is vague, or omits relief the district court obviously intended to grant, then the Region should consider whether to file a motion to clarify the order. If the Region is aware of a change in circumstances, or has otherwise obtained new evidence which, had it been heard by the district court would have affected the case, then the Region should consider whether to ask for a modification of the order. In either instance, the Region should confer with the Injunction Litigation Branch regarding any possible defects in the district court order and for authorization to file a motion clarifying or modifying the order.

10.3 Appeal Consideration if 10(j) Relief is Denied

The Injunction Litigation Branch evaluates each 10(j) loss, in part or in total, as a potential appeal. The Board, as a Federal agency, has 60 days from entry of the district court order to file a notice of appeal (Fed.R.App.P. 4(a)(1)(B)). Consequently, Regions should immediately inform the ILB of the entry of a final order in district court, followed up by a fax of the decision and order. This will trigger the appeal consideration process by ILB personnel.

In addition to the district court decision itself, the ILB bases the propriety of an appeal on three sets of documents: the record before the district court, a transcript of district court proceedings, and the Region's recommendation as to the merits of an appeal. Generally, Regions should send the district court record to the ILB as soon as possible, including the petition; supporting memoranda of points and authorities, as well as opposing briefs; and the record evidence submitted by both parties upon which the court relied (e.g., affidavits or the transcript of an ALJ hearing). The Region, however, should consult with the ILB to determine whether the case warrants transmission of the entire district court record.

Consideration of an appeal generally warrants review of the district court transcript. The Region is responsible for ordering the transcript and, if in doubt about the need for a transcript, should contact the ILB. A transcript may be unnecessary in certain circumstances, such as situations where the district court granted most of the requested relief and an appeal by respondent is unlikely. The Region should advise the ILB of the transcript's delivery date and arrange for the court reporter to deliver it directly to the ILB, if possible.

The Region's role in an appeal consideration culminates with the submission of a written recommendation. Although it is unnecessary to reiterate the merits of the petition, the Region should briefly relate the procedural history of the case before the district court, including the date the Region filed the petition; the date, nature and disposition of pertinent, substantive motions that bear on the ability to secure the requested relief (e.g., motions to dismiss); the hearing dates; and the evidentiary basis upon which the case was tried (e.g., affidavits or ALJ transcript). Since the 10(j) loss is reviewed in light of the evidentiary posture at trial, it is crucial to identify any material record evidence which differed from the facts upon which the Board authorized injunctive proceedings and analyze what, if any, impact the changed record would have on an appeal consideration. The Region should also identify any evidence which the court discredited and analyze the propriety of the credibility resolution according to circuit law.

The Region also should consider whether the decision is subject to reversal pursuant to the standard of review in the relevant circuit. Although standards differ, this analysis generally involves determining whether any of the court's adverse findings of fact were clearly erroneous; whether the court based its legal conclusions on an erroneous legal standard; and whether the failure to grant 10(j) relief constitutes an abuse of discretion. The Region should draw upon supporting, in-circuit precedent, as well as analyses of adverse case law. The Region should also review the court's adverse inferences, if any, to determine whether they were reasonably based in light of record evidence or, alternatively, constituted an abuse of discretion. The Region should further weigh the relative merits of likely respondent defenses to our arguments on appeal, as well as articulating possible rebuttals to those defenses.

The Region should next determine whether the denied relief continues to be needed, indicating any changed circumstances as well as the charging party's viewpoint. For instance, in a nip-in-the-bud case, the Region should determine whether the union believes its campaign is still viable and whether discriminatees remain willing to accept interim reinstatement.

Finally, the Region should analyze any policy considerations that support or negate taking an appeal. These would include the possible effect of adverse legal precedent resulting from a loss before the appellate court and any impact of an unappealed district court decision on future 10(j) litigation.

10.4 Monitoring Compliance with the 10(j) Injunction

To ensure the effectiveness of a 10(j) decree, the Region should monitor the respondent's compliance with all aspects of the district court's order, especially any affirmative provisions, such as reinstatement, bargaining, or rescission orders. The Region should take the following steps in order to monitor compliance:

- Once the injunction is issued, the Region should maintain contact with the charging party, employees, or other interested parties to stay apprised of respondent's post-injunction conduct.

- The Region should keep in mind any deadlines contained in the injunction (e.g., for reinstatement offers to be made, for the affidavit of compliance to be filed) and check that respondent has taken appropriate action within the prescribed time periods.

- The Region should also inquire whether any triggering events or actions required by the charging party, such as a union's request for bargaining or for rescission of unilateral changes, have taken place.

10.5 Investigating Possible Contempt of the 10(j) Injunction

If a respondent appears to be in noncompliance, the Region should conduct a contempt investigation. Post injunction monitoring and contempt proceedings are essential tools in making sure that 10(j) decrees fulfill their purpose. The following are guidelines for these important post-injunction procedures.

- If the Region believes the respondent is in noncompliance with the court's order, the Region should identify the specific provisions of the order that are not being followed. The Region should analyze exactly what the order requires, of whom, and identify the acts or omissions it believes are noncompliant with those requirements.

- The Region should conduct an investigation, obtaining witness affidavits or documentary evidence, to establish how those specific provisions of the order are being disregarded. For example, in a reinstatement case, it may be necessary to obtain affidavits from each discriminatee to establish that no reinstatement offers have been made or that the offers are insufficient. In a refusal to bargain case, affidavits from union representatives, copies of bargaining demands or other correspondence between the parties may be required.

- In conducting this investigation, the Region should bear in mind the higher standard of proof required to show civil contempt, i.e., "clear and

convincing" evidence of noncompliance.[41] But, the elements of contempt may be proven by circumstantial evidence.[42] Moreover, contempt violations do not have to be willful or intentional, and good faith is not a defense.[43]

- During the investigation, the Region should contact respondent to ascertain that respondent received a copy of the district court's order. The Region should advise respondent that it believes there is noncompliance with the order and that it is conducting a contempt investigation. Respondent should be given an opportunity to respond and present evidence of compliance or raise defenses to contempt.

- The purpose of civil contempt sanctions are intended to coerce compliance with the order and compensate a party for damages resulting from noncompliance.[44]

- Contempt orders generally include payment to the Board of compensatory damages for the costs and expenditures incurred in investigating and prosecuting the contempt proceeding, including attorney fees of Board personnel. In order to calculate the Board's damages, Regional professional personnel should maintain a daily record of the time spent on the contempt case during this investigatory phase and continuing through prosecution of the contempt case. These records should be maintained in increments of tenths of 1 hour (or, every 6 minutes) and should include specific details of activities. Please contact ILB for further instructions and to obtain the appropriate forms for recording time.

10.6 Submitting a Contempt Recommendation to ILB

If the Region's post-decree investigation indicates that the respondent is not complying with the 10(j) injunction, and the Region determines there is "clear and convincing" evidence to indicate that the respondent is in contempt, the Region should submit the case to the Injunction Litigation Branch with a recommendation regarding whether to institute contempt proceedings. The Region's memorandum should include the following:

[41] *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1184–1186 (D.C. Cir. 1981); *Squillacote v. Meat & Allied Food Workers Local 248*, 534 F.2d 735, 746–747 (7th Cir. 1976).

[42] *Walker v. City of Birmingham*, 388 U.S. 307, 312 fn. 4 (1967).

[43] *Asseo v. Bultman Enterprises*, 951 F.Supp. 307, 312 (D.P.R. 1996).

[44] *Gompers v. Buchs Stove & Range Co*., 221 U.S. 418, 441–444 (1911).

- a description of the 10(j) order, attaching a copy of the district court's opinion an order, including any modifications or clarifications;

- identify the specific provisions of the order with which the respondent is failing to comply;

- describe the evidence of noncompliance obtained in the Region's investigation;

- summarize respondent's position on the contempt allegations;

- analyze the investigation results and respondent's defenses, and explain the basis for the Region's conclusion, applying the appropriate contempt standard (e.g., "clear and convincing" evidence for civil contempt);

- state the Region's recommendation as to contempt proceedings and a proposed contempt order.

A sample contempt memorandum issued by the ILB containing relevant contempt principles, arguments, and the suggested format for a contempt decree, is located in Appendix Q of this Manual.

10.7 Impact of an Informal Settlement Agreement on a 10(j) Order.

From time to time, cases in which the Board has obtained interim 10(j) relief are subsequently settled by an informal settlement agreement. However, the language contained in the standard informal settlement agreement may create a compliance problem when there is an outstanding 10(j) decree.

The standard language provides that approval of the settlement agreement constitutes withdrawal of the complaint. But, since a 10(j) injunctive order terminates by operation of law upon the Board's final disposition of the case, there is the potential for a respondent to conclude that the case has been disposed of with the execution of the settlement and that the injunction thereupon expires by operation of law. This interpretation could interfere with the Board's ability to institute proceedings for contempt of the injunction based on continued misconduct during the compliance period, even if such action would constitute a breach of the settlement agreement sufficient to justify setting aside the agreement and litigating the unfair labor practice case.

In order to preserve the Board's authority to seek contempt sanctions under the 10(j) decree, the Region should modify the language of the standard informal settlement agreement to make it clear that the respondent's entering into the settlement will not result in the immediate withdrawal of the complaint, dismissal of the charge, or the vacating of the 10(j) injunction. Rather, the complaint will be withdrawn after compliance is complete. The Region should modify the standard informal settlement agreement with the model language set forth in Memorandum OM 01-62, *Use of Special*

Informal Settlement Language in cases with Outstanding Section 10(j)-10(l) Injunctions, which is located in Appendix R of this Manual.

10.8 Adjustment of the 10(j) Case

There may be occasions when a respondent is willing to adjust the 10(j) case while the case is pending in district court but desires to litigate the underlying unfair labor practice case before the Board. In those circumstances, the Region has two 10(j) settlement options: a consent injunction or a settlement stipulation. First, a respondent can enter into a consent injunction by which it agrees to entry of a 10(j) order that tracts the proposed order to the district court. If a respondent violates the consent injunction, it will be subject to contempt proceedings. This type of adjustment is desirable where a respondent has a proclivity to violate the Act or where the Region has concerns that respondent will not abide by the terms of an injunction.

Alternatively, a respondent can enter into a stipulation by which it agrees to terms equivalent to a consent injunction and to an indefinite postponement of the case in district court.[45] Under this type of settlement stipulation, if respondent breaches the injunctive terms, the court will conduct an expedited hearing to determine only whether there is reasonable cause to believe (or likelihood of success in showing) that the respondent has failed to comply with the settlement undertakings. Once a breach is shown, respondent agrees to entry of a consent injunction. A respondent may be more willing to enter into a stipulation than a consent injunction because a stipulation breach does not result in civil contempt, as does the breach of a consent injunction. This type of 10(j) adjustment is most appropriate where the Region believes that the respondent is likely to comply with the stipulation.

10.9 Issuance of Board Decision in Underlying Unfair Labor Practice Case

A 10(j) order is designed to provide interim relief during the pendency of the administrative proceeding and preserve the Board's ability to issue a meaningful order. Therefore, at some point while a 10(j) injunction is in effect, the Board will issue its final order in the underlying unfair labor practice case. When the final Board order issues, the 10(j) injunctive decree dissolves as a matter of law.[46]

When a 10(j) order is in effect, and the Board issues an order in the underlying case, the Region should immediately advise the ILB of the issuance of the Board's order. ILB can provide sample papers to instruct the Region on the best method for informing the district court of the issuance of the Board decision and its impact on the 10(j) decree. The Region should also consider and, where appropriate, discuss with ILB and the

[45] See App. S, "Stipulation and Order Continuing Case under 29 U.S.C. Section 160(j)."

[46] *Barbour v. Central Cartage, Inc.*, 583 F.2d 335, 336–337 (7th Cir. 1978); *Johansen v. Queen Mary Restaurant Corp.*, 522 F.2d 6 (9th Cir. 1975).

Appellate Court Branch whether there is a need for a 10(e) injunction to protect statutory rights pending enforcement of the Board order.

11.0 CONCLUSION

Section 10(j) of the Act remains a powerful tool for this Agency to effectively enforce the rights guaranteed by the Act. The ILB is committed to providing Agency personnel with the resources to help identify, investigate and litigate 10(j) cases. Please feel free to contact the ILB to discuss any questions or problems which may arise during the course of processing a 10(j) case.

APPENDIX A

THE 10(J) CATEGORIES

1. Interference with organizational campaign (no majority)

- includes traditional"nip-in-the-bud" unfair labor practices, such as threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges

- if it includes shutdown or relocation of operations, subcontracting, or transfer of operations to alter ego or single or joint employer, see Category 3

- if it includes minority union recognition, see Category 6

2. Interference with organizational campaign (majority)

- includes *Gissel* cases where union has obtained a majority of authorization cards and employer engaged in serious and egregious unfair labor practices (see Memorandum GC 99-8 *Guideline Memorandum Concerning Gissel*)

- will include unfair labor practices similar to Category 1

3. Subcontracting or other change to avoid bargaining obligation

- these involve an employer's implementation of a major entrepreneurial-type decision which may include shutdown or relocation of operations, transfer of operations to alter ego, or single, or joint employer

- changes may be discriminatorily motivated in violation of Section 8(a)(3) and/or independently violative of Section 8(a)(5)

4. Withdrawal of recognition from incumbent

5. Undermining of bargaining representative

- includes implementation of important changes in working conditions, either discriminatorily or without bargaining with the union

- may include any of the additional types of violations listed in Category 1, above

- see also successor refusal to bargain (Category 7) or conduct during bargaining (Category 8)

6. Minority union recognition

- includes variety of illegal assistance to and/or domination of a labor organization

7. Successor refusal to recognize and bargain

- includes discriminatory refusal to hire predecessor's employees

8. Conduct during bargaining

- includes refusal to provide relevant information, delay or refusal to meet, insistence to premature impasse or impasse on permissive or illegal subjects of bargaining, unlawful course of conduct in bargaining, or surface bargaining

9. Mass picketing and violence

- includes mass picketing which blocks ingress and egress to the plant or worksite, violence and threats thereof, and damage to property

10. Notice requirements for strikes or picketing under Section 8(d) and (g)

- includes strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (Federal and State mediation) and 8(g) (notices to health care institutions)

11. Refusal to permit protected activity on property

- may include employee picketing or handbilling arising from a labor dispute, or nonemployee efforts to disseminate organizational material to employees

- may also include a unilateral change in past practice or contractual term granting access to an incumbent union

12. Union coercion to achieve unlawful objective

- may involve union insistence to impasse on permissive or illegal subject of bargaining, or union conduct that amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective-bargaining or grievance adjustment

13. Interference with access to Board processes

- may involve employer or union retaliation against employees for having resorted to the processes of the Board

- retaliation may include threats, discharges, the imposition of internal union discipline, or the institution of groundless lawsuits

14. Segregating assets

- includes any alienation of assets which may require a protective order to preserve respondent's assets for backpay

15. Miscellaneous

- includes injunction against certain lawsuits, employer violence, and interference with employee activities for mutual aid and protection

APPENDIX B

CHECKLIST FOR INVESTIGATION OF REQUESTS FOR THE 10(J) RELIEF

The following questions may help to elicit evidence relevant to the analysis of whether 10(j) relief is "just and proper" in a particular case. It should be emphasized that 10(j) determinations are made on a case-by-case basis, following careful examination by the Office of the General Counsel and the Board, of all relevant facts and law. These determinations are not dependent upon the presence or absence of any particular fact. The questions are grouped according to the types of violations for which relief is sought.[1] For each type of violation, we have cross-referenced the applicable categories of cases.

A. Unlawful Antiunion Activities and Discharge of Employees (Categories 1, 2, 3, 4, and 5)

1. Are ULPs isolated or do they form a pattern aimed at destruction of organizing campaign?

2. Size of bargaining unit (greater impact in small unit).

3. Number and percentage of unit employees subjected to ULPs.

4. Was knowledge of unfair labor practices widespread among employees?

5. Were violations committed by senior employer officials?

6. Were 8(a)(3) violations committed in a manner intended to intimidate other employees?

7. Were discriminatees active in union?

   (a) What did they do?

   (b) Were they perceived as leaders by other employees?

   (c) Are they willing to resume the campaign if reinstated?

8. Are ULPs blocking a representation case or a scheduled election?

   (a) Is union willing to revive campaign and/or proceed to an election if court orders injunctive relief?

[1] This checklist is designed to assist Board agents in conducting investigations, and is not intended as an exhaustive list of relevant inquiries. Board agents should pursue all relevant leads based upon the facts of the case and current law and consult with their supervisor about the scope of the investigation.

9. Any scattering of employees "to the four winds"?

   (a) Which discriminatees desire reinstatement?

   (b) If employees do not desire reinstatement, why not (fear, intimidation, better job elsewhere)?

   (c) Types of interim employment discriminatees have obtained: wage rates, locations in relation to employer's facility (scattering of employees reduces likelihood of return to employer).

10. Evidence of chill/loss of support on organizing activities.

   (a) Evidence of chill/loss of support for incumbent union (drifting away of members, deterioration of union's legitimacy with members). Employees refuse to talk to union organizers, take union literature or cards, wear union insignia, or assume leadership positions.

   (b) Statements by employees that they are afraid for their jobs, afraid to support the union, or, in case of grant of benefits, no longer see a need for the union (hearsay statements from a union business agent may be admitted to show employee state of mind).

   (c) Lower attendance at union meetings.

   (d) Employees revoke or seek return of union authorization cards.

   (e) Reduction in rate at which cards are signed, after ULPs commenced.

   (f) Employees crossing organizational/recognitional picket lines.

   (g) Employees sign antiunion petition.

11. Evidence of chill/loss of support for incumbent union (drifting away of members, deterioration of union's legitimacy with members).

   (a) Drop in union membership, including the absence of new members where membership has been on the increase.

   (b) Cancellation of dues checkoff.

   (c) Decrease in number of grievances filed or fear of filing grievances (assuming employer is complying with grievance machinery).

   (d) Statements of dissatisfaction by employees, including desire to strike, engage in work stoppages, or violence.

(e) If there is a strike, number and percentage employees who cross picket lines after ULPs.

(f) Lower attendance at union meetings.

(g) Reluctance to talk to union officials or become involved in union activities.

(h) Employees sign antiunion petition.

(i) Longevity of employment, and intimacy/cohesiveness of employees in unit.

B. Unlawful Employer Refusal to Recognize and Bargain (Including *Gissel* Bargaining Order, Unlawful Withdrawal of Recognition, Successor Refusal to Recognize, Unlawful Conduct During Negotiations--Insistence on Change in Unit or other Nonmandatory Subject, Refusal to Meet and Deal) (Categories 2, 3, 4, 5, 7, and 8)

1. Length of collective-bargaining relationship (likelihood of loyalty to union).

2. Size of bargaining unit (small size accentuates any 8(a)(1) and (3) violations).

3. Number and percentage of employees in bargaining unit affected by ULPs.

4. Actual loss of support for union (see A.10, above).

5. Any problems with union's majority status (coerced or tainted cards) or with appropriate unit? In "good-faith doubt" cases, how strong is employer's defense?

6. Has the union threatened to strike or has it already commenced a strike? (Industrial unrest favors interim bargaining order.)

   (a) What kind of strike is it (e.g., ULP strike, economic strike, or unprotected strike)?

   (b) What effect, if any, is the strike having on the employer's operations? Is public interest being affected by strike, e.g., municipal/state construction, or other quasi-public services?

   (c) Has union made unconditional offer to return to work? Has employer hired permanent replacements?

7. Have employees been locked out? Have they been replaced?

8. Have employer's bargaining violations caused, exacerbated or prolonged strike; or precluded negotiations on other subjects?

9. Is there a history of amiable bargaining between the parties? Is this bargaining for a first agreement? Is bargaining following a recent Board election? Was representation case protracted?

10. In *Gissel* bargaining order cases:

    (a) How large was the union's card majority?

    (b) Any demonstrable loss of majority?

        (1) Withdrawal or revocation of union authorization cards.

        (2) Union lost Board-conducted election.

        (3) Lower attendance at union meetings.

        (4) Employees resigned from union membership.

        (5) Employees sign antiunion petition.

        (6) Employees reluctant to take leadership positions in union.

    (c) Serious nature of violations, including "hallmark" violations (e.g., discharges, threats to close, 8(a)(1) violations committed by senior employer agents).

    (d) Any dissemination of violations among employees: number and who affected and knew of violations

    (e) Have unfair labor practices continued?

    (f) Any mitigating circumstances between time majority established and 10(j) hearing.

        1) Substantial employee turnover not due to employer's ULPs (e.g., seasonal business).

        2) Change in management or management policies toward union; removal of agents who committed ULPs.

        3) Employer's voluntary remedy for some of violations, e.g., reinstate some of 8(a)(3)s

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C. Unlawful Unilateral Changes (Categories 2, 3, 4, 5, 7, and 8)

1. Did changes affect important working conditions? Were substantial numbers of unit employees affected? Are employees upset? Is union being blamed for its inability to correct changes? (See A,10, above.)

   (a) Has employer discontinued health-care coverage for unit employees? Have any employees foregone medical care as a result?

   (b) Has employer eliminated nonmonetary benefits at core of union's representational status (e.g., refused to process grievances, denied union representatives access to plant)?

   (c) Has employer failed to pay benefit fund contributions? Are any union benefit funds insolvent, or in serious risk of insolvency, as a result?

   (d) Has union acceded to unlawful employer demands in grievance handling or negotiations?

2. Were unremedied unilateral changes a major stumbling block to the parties' negotiations?

3. Are unilateral changes isolated in nature or is there a pattern? History of prior ULPs?

4. Does union want prior working conditions restored?

5. Is union pursuing any Section 301 remedy?

6. In cases involving a successor's refusal to recognize union that represented predecessor's employees, how do terms and conditions of predecessor differ from successor?

D. Unlawful Refusal to Provide Relevant Information (Categories 2, 3, 4, 5, 7, and 8)

1. Are parties now bargaining?

2. How, if at all, does the absence of requested information affect the likelihood that parties will reach agreement?

3. Is information requested relevant to major issue in dispute?

E. Unlawful Shutdown of Operations (including relocation or subcontracting) (Category 3)

1. Extent of employer's alienation of property.

   (a) Is plant/equipment presently offered for sale or lease?

   (b) What assets has employer already relocated/moved/ sold?

   (c) Did employer dispose of any critical assets while ULP proceeding pending? (If so, restoration order may already be burdensome.)

2. Was there a legitimate loss of work, i.e., would restoration fail to restore jobs because they were lost as a result of lawful economic changes?

3. Does restoration order threaten employer's viability, given size of company and extent of operations?

4. Number and percentage of employees affected by relocation/sub-contracting closing. (See also A, above.)

5. Number and extent of ULPs (the more flagrant, the more equitable the restoration relief). (See also A, above.)

6. If shutdown in violation of bargaining obligation, how would restoration, or lack thereof, affect bargaining? Would a bargaining order without restoration be effective?

F. Unlawful Employer Recognition of Assisted Union (Category 6)

1. Extensiveness of employer interference (e.g., percentage of unit employees unlawfully influenced to support minority union)?

2. Is there an incumbent union or rival union with majority support? Could QCR be raised?

3. If so, has the support for the incumbent/majority union been diminished by ULPs (see A,10, above)?

4. Has rival union petitioned for election; is it willing to file Carlson waiver and request to proceed to election if 10(j) decree is granted?

5. If there are accompanying 8(a)(1) and (3) violations, are they continuing?

6. Is minority union contract in effect?

   (a) Does it have a union-security clause?

   (b) Is it favorable or unfavorable to employees?

7. Is 8(a)(2) union unlawfully dominated, or merely assisted?

G. Unlawful Violence and other Picket Line Misconduct (Category 9)

1. Nature of violations speaks for itself. However, how strong is evidence for union agency?

2. Union action to stop violence and misconduct.

   (a) Has union disavowed violence and/or disciplined any members, withheld strike benefits, or prohibited offending members from picketing?

   (b) Has union effectively aided misconduct (e.g., provided strike benefits to picketers engaged in misconduct; provided legal assistance or paid bail bond of members arrested for misconduct)?

3. State authorities' willingness and ability to control the misconduct.

   (a) What efforts have state or local police made to stop the misconduct? To what extent have these efforts been successful in halting the misconduct?

   (b) Has charging party resorted to state court? Has state court issued any injunctions and/or contempt citations to stop misconduct? To what extent have these state court orders been successful in stopping the misconduct?

H. Unlawful Strikes and Picketing in Violation of 8(d) and 8(g) Notice Provisions (Category 10)

1. What is economic impact of strike or picketing on normal operations of employer or customers? In 8(g) cases, has strike interrupted continuity of patient care (e.g., disruptions to normal services to patients, cutback in elective surgery, disruptions of receipt of supplies, refusals of patients or other employees to cross picket lines)?

2. Has any party requested mediation by FMCS or the state mediation services? How much mediation took place? Did charging party frustrate mediation?

3. Has employer replaced strikers? (If so, operation may not be disrupted.)

4. Has union offered to supply critical employees despite strike?

APPENDIX B

I. Unlawful Denial of Access to Property[2] (Category 11)

1. Union's use of alternative means of communications with its intended audience.

   (a) What methods of contacting audience has union used (e.g., mass media, requested employee names/addresses from employers?

   (b) How successful have these efforts been?

   (c) Has the employer attempted to block these efforts?

2. Has the employer attempted to make some accommodation (e.g., inside v. outside mall entrances)?

3. If access is sought to solicit employees, would it occur during working or nonworking time?

4. Is the closest public location for picketing/handbilling hazardous? If so, how?

5. If union is only handbilling, could union lawfully picket and communicate essence of message to public?

6. Has union picketing continued on disputed property without incident after access was initially denied?

7. If incumbent union is seeking access to established bargaining unit, are there any grievance matters on site, e.g., safety problems, needing union physical inspection?

8. Will the purpose of the union's picketing be over before the Board order issues (e.g., union's economic strike, construction project, political campaign, safety problem)?

9. If union is engaged in an organizing campaign:

   (a) Had union obtained any authorization cards before it began picketing? After picketing began? If so, how many? How were they obtained?

   (b) How many employees attended union meetings before picketing began? After picketing began?

   (c) Did union ask employer for list of employee names and addresses? What was employer's response?

[2] Many of these questions may already be answered as part of the investigation of the merits of an access case under *Lechmere*.

10. If union is protesting area standards, is there any evidence that primary employer's substandard benefits threaten to undermine union benefits elsewhere, e.g., union is about to negotiate master agreement and union employers demand concessions because of primary employer?

11. Has picketing caused any work cessation or other disruption to date? Are there any allegations that union engaged in threats or violence, blocked ingress?

12. Is union's intended audience located in inherently inaccessible place? (E.q., out-of-state employees, logging camp, ships without public facilities nearby.)

J. Union Coercion (Strike, Threats, Fines, etc.) to Achieve Unlawful Object (Categories 12 and 13)

1. What, if any, adverse impact is union's conduct having on the employer's operation (e.g., affecting relationship with customers, bidding on work)?

2. What, if any, adverse impact is union's conduct having on employees (e.g., is union attempting unlawfully to enforce contract, prevent implementation of contract, or impair employee rights to select union)?

3. Is employee victim of unlawful discipline precluded from participating in intraunion political affairs?

4. Is internal union discipline threatening labor contract stability with an employer?

5. Is union's conduct disrupting negotiations, or an employer's choice of bargaining representative?

K. Unlawful Filing and/or Maintenance of Civil Lawsuit to Interfere with Protected Activity, Internal Union Discipline (Categories 12 and 13)

1. Have any employees abandoned protected activity as a result of suit? Has respondent publicized lawsuit, fines to other employees?

2. What relief is respondent seeking in its lawsuit (e.g., damages, how much; jail term in criminal complaint cases)?

3. When is trial scheduled (more imminent, the greater need for interim relief)?

4. Has employee been required to pay union fines or is payment required imminently?

5. Can sued employee afford legal representation?

6. Has sued party moved state court to stay proceeding in light of Board's ULP complaint? If so, what result? If not, why not?

7. Is suit unlawful because it lacks reasonable basis in fact of law under *Bill Johnson's* or, alternatively because preempted or for "unlawful object" (*Bill Johnson's* fn. 5)?

8. Is an R case being blocked by respondent's misconduct?

L. Unlawful Interference with Access to Board Processes (Including Fines, Lawsuits) (Category 13)

1. Have any employees expressed fear of filing charges, or declined to file charges, cooperate in Board investigation, give testimony or otherwise participate in Board processes?

2. Have any employees changed prior testimony given in an affidavit or Board hearing as a result of employer or union action?

3. For lawsuits, union discipline, initiated in retaliation for participation in Board proceedings, see also section K, above.

4. Where conduct complained of is discharge for going to Board, are employees other than those discriminated against aware of discrimination? For what reasons do these employees believe that discriminatees were discharged (most relevant in small plant)? See also section A, above.

M. Alienation of Assets to Avoid Board Liability (Protective Orders) (Category 14)

1. What is estimated monetary liability from ULPs?

2. Has employer indicated intent to close operation and/or liquidate its assets?

3. Has employer begun to liquidate its assets (e.g., removed equipment or materials, closed plant or placed it on market)? When?

4. Any evidence that assets were transferred with motive to evade backpay liability?

5. Is public auction scheduled to sell assets? When?

6. Are assets under judicial control (i.e., bankruptcy court, state proceeding to protect creditors, receivership)? Where? Can Board file a proof of claim?

APPENDIX B

7. Where the business is winding down, what is the likelihood that the liquidated assets will exceed the claims of secured creditors, current bona fide business expenses and liens of record?

8. Has employer expressed willingness to post bond to cover potential monetary liability or give written assurances to set aside sufficient funds to satisfy its financial liability?

9. Has employer refused to provide Board with reasonable method of oral/written communication or address? Are whereabouts of the employer known?

10. Has employer refused to comply with investigative subpoena regarding alienation of assets?

11. Has employer demonstrated propensity to misuse corporate form (e.g., creation of alter egos, commingling personal and corporate funds, inordinate salaries to officers or distribution of dividends to shareholders in closely held corporation)?

12. Is Region prepared to amend complaint or issue backpay specification to name another entity as a derivative respondent with backpay liability (e.g., single employer, joint employer, alter ego, *Perma Vinyl* successor)? Presence of deep pockets may moot need for protective order.

APPENDIX C

SUGGESTED OUTLINE FOR REGIONAL MEMORANDUM RECOMMENDING 10(j) RELIEF

I. BACKGROUND

A. Procedural history, including date charge(s) filed, by whom, date complaint issued, and scheduled hearing date, if any

B. If related representation case, include procedural history of representation case, such as date representation petition filed, date election held or scheduled to be held, outcome of election, or present status of representation proceeding

C. Brief description of parties

1. location and nature of employer's operations

2. size of overall work force as well as number of employees in relevant unit

3. collective-bargaining history, if any, including term of most recent collective-bargaining agreement

II. FACTS

A. Describe events in chronological order

B. Include titles of managers/supervisors

C. Include all facts relevant to support prima facie case for each violation alleged in complaint

D. Include all facts relevant to rebut respondent defenses

E. Include all facts relevant to prove "just & proper" (i.e., evidence of impact)

III. MERITS ANALYSIS

A. Indicate appropriate standard for circuit in which case arises

B. Provide analysis for each unfair labor practice that is alleged in complaint and that you recommend litigating in the 10(j) proceeding. Minor independent violations of Section 8(a)(1) may be treated summarily.

1. use all facts necessary to support the allegation

2. where credibility disputes exist, provide explanation for resolution of dispute

3. indicate other anticipated evidentiary problems and how Region expects to resolve them

4. cite the Board and, where possible, relevant circuit court law to support the theory of violation alleged in the complaint (not necessary for routine violations)

5. address adverse precedent in the circuit in which the case would be heard

6. provide analysis to show why Board would grant any special remedies requested in administrative case (i.e., Gissel bargaining order, restoration of operations) and circuit court law enforcing those remedies

C. Provide analysis to rebut respondent defenses

IV. JUST AND PROPER ANALYSIS

A. Indicate test for judging propriety of relief for circuit in which case arises

B. Explain why interim relief is necessary to preserve efficacy of final Board order using theories of just and proper, e.g., chill, threat of scattering, absence of leaders, undermining of union support, impediment to bargaining, etc.

1. Use evidence adduced during investigation

2. Use inferences permitted by 10(j) caselaw

C. Distinguish the case from adverse 10(j) precedent, if any

D. If applicable, respond to respondent's arguments that injunctive relief would be unduly burdensome

E. Where the recommended injunctive relief differs from that which is sought in the underlying administrative proceeding, explain the discrepancy

V. PROPOSED ORDER

A. Include separate sections for the cease and desist and affirmative provisions (including catch-all, narrow or broad cease and desist)

B. The proposed relief should track the relief sought in the underlying administrative proceeding (but see IV,E., above)

C. Include relief which is unique to 10(j) proceedings such as posting of the district court's order, affidavit of compliance, and where applicable, access to books and records (e.g., to monitor preferential hiring list).

VI. ATTACHMENTS

A. Include a sheet listing all counsel of record in the case

B. Send with the 10(j) recommendation any position statements submitted by the parties which address the issue of 10(j) relief

C. Send a copy of the administrative complaint and if available, the answer. If complaint is not ready, send it to ILB when issued.

APPENDIX D

SECTION 10(j) STANDARDS –

FIRST CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See *Fuchs v. Hood Industries, Inc.*, 590 F.2d 395, 396 (1st Cir. 1979), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See *Pye v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001); *Asseo v. Centro Medico del Turabo*, 900 F.2d 445, 454-55 (1st Cir. 1990); *Angle v. Sacks*, 382 F.2d 655, 659-60 (10th Cir. 1967), cited in *Sharp v. Webco Industries*, 225 F.3d 1130, 1135 (10th Cir. 2000).

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

APPENDIX D

To resolve a 10(j) petition, a district court in the First Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." *Pye v. Excel Case Ready*, 238 F.3d at 72; *Asseo v. Centro Medico del Turabo*, 900 F.2d at 450, 453; *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25-26 (1st Cir. 1986).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See *Asseo v. Centro Medico del Turabo*, 900 F.2d at 450; *Maram v. Universidad Interamericana de Puerto Rico*, 722 F.2d 953, 958-959 (1st Cir. 1983). Rather, the court's role is limited to determining whether "the Regional Director's position was fairly supported" by the evidence. *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d at 450; *Maram v. Universidad Interamericana*, 722 F.2d at 959. The district court "is not the ultimate fact-finder, but merely determines what facts are likely to be proven to determine if the standard for an injunction has been met." *Pye v. Excel Case Ready*, 238 F.3d at 71, n. 2.

The district court should not resolve contested factual issues and should defer to the Regional Director's version of the facts if it is "within the range of rationality." *Maram v. Universidad Interamericana*, 722 F.2d at 958; *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 158, 163 (1st Cir. 1995). Accord: *Fuchs v. Hood Industries*, 590 F.2d at 397 (district court's function is limited to whether contested factual issues could ultimately be resolved by the Board in favor of the General Counsel). The district court also should not attempt to resolve issues of credibility of witnesses. See *Fuchs v. Jet Spray Corp.*, 560 F.Supp. 1147, 1150-51 n. 2 (D.Mass. 1983), affd. per curiam 725 F.2d

664 (1st Cir. 1983); *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 237 (6th Cir. 2003); *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570 (7th Cir. 1996).

Similarly, on questions of law, the Regional Director need only establish that the legal theories relied on are "not without substance." *Union de Tronquistas de Puerto Rico, Local 901 v. Arlook*, 586 F.2d 872, 876 (1st Cir. 1978).[2] Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 101 (3d Cir. 2011) ("our 'reasonable cause' inquiry directs us to examine whether the Director's legal theory is 'substantial and non-frivolous'"); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850, 855 (5th Cir. 2010); *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237.

B. The "Just and Proper" Standard

Interim injunctive relief is appropriate to preserve and restore the status quo "when the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless. . . " *Asseo v. Centro Medico del Turabo*, 900 F.2d at 455, quoting *Angle v. Sacks*, 382 F.2d at 660. District courts in the First Circuit rely on the traditional standards for granting preliminary injunctive relief to make that judgment. *Pye v. Excel Case Ready*, 238 F.3d at 73; *Asseo v. Centro Medico del Turabo*, 900 F.2d at 454. Under those standards, relief is appropriate if the Board demonstrates: (1) a likelihood of

[2] *Arlook* involved an injunction proceeding under Section 10(l) of the Act (29 U.S.C. Section 160(l)). Section 10(l) is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated violations, such as secondary boycotts. The legal analysis under the two sections is basically the same. See, e.g., *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 787 n.7 (5th Cir. 1973); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1084 (3d Cir. 1984).

success on the merits; (2) the potential for irreparable injury in the absence of relief; (3) that such injury outweighs any harm preliminary relief would inflict on the defendant; and (4) that preliminary relief is in the public interest. *Pye v. Excel Case Ready***,** 238 F.3d at 73, n.7; *Asseo v. Centro Medico del Turabo,* 900 F.2d at 454. The Board must demonstrate that irreparable injury is "likely" in the absence of an injunction. *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011), citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). See also *Frankl v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011).

The First Circuit has also recognized that the public interest is served by granting interim injunctive relief that strengthens the collective-bargaining process. *Pye v. Excel Case Ready*, 238 F.3d at 75, n.11; *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d at 455. Section 10(j) interim relief "is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining." *Pye v. Excel Case Ready*, 238 F.3d at 75.

APPENDIX D

SECOND CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See *Kreisberg v. HealthBridge Management, LLC*, 732 F.3d 131, 143 (2d Cir. 2013); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1055 (2d Cir. 1980); *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See, e.g., *Seeler v. The Trading Port, Inc.*, 517 F.2d at 37-38.

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

APPENDIX D

To resolve a 10(j) petition, a district court in the Second Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See, e.g., *Kreisberg v. HealthBridge Management, LLC*, 732 F.3d at 141-142; *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 365 (2d Cir. 2001); *Silverman v. J.R.L. Food Corp. d/b/a Key Food*, 196 F.3d 334, 335 (2d Cir. 1999). See also *Mattina v. Kingsbridge Heights Rehabilitation and Care Center*, 329 Fed.Appx. 319, 321 (2d. Cir. 2009).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1032-1033 (2d Cir. 1980). Rather, the court's role is limited to determining whether there is "reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals." *Kaynard v. Mego Corp.*, 633 F.2d at 1033, quoting *McLeod v. Business Machine and Office Appliance Mechanics Conference Board*, 300 F.2d 237, 242 n. 17 (2d Cir. 1962). The district court should not resolve contested factual issues; the Regional Director's version of the facts "should be given the benefit of the doubt" (*Seeler v. The Trading Port, Inc.*, 517 F.2d at 37) and, together with the inferences therefrom, "should be sustained if within the range of rationality" (*Kaynard v. Mego Corp.*), 633 F.2d at 1031). The district court also should not attempt to resolve issues of credibility of witnesses. *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at 1051-1052, n. 5. See also *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996), cert. denied 519 U.S. 1055 (1997); *Fuchs v. Jet Spray Corp.*, 560 F.Supp. 1147, 1150-51 n. 2 (D.Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983).

Similarly, on questions of law, the district court "should be hospitable to the views of the [Regional Director], however novel." *Kaynard v. Mego Corp.*, 633 F.2d at

1031, quoting *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, I.L.G.W.U.)*, 494 F.2d 1230, 1245 (2d Cir. 1974). The Regional Director's legal position should be sustained "unless the [district] court is convinced that it is wrong." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at 1051. Accord: *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995) ("appropriate deference must be shown to the judgment of the NLRB, and a district court should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed"); *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d at 365.

B. The "Just and Proper" Standard

The Second Circuit has recognized that Section 10(j) is among those "legislative provisions calling for equitable relief to prevent violations of a statute" and courts should grant interim relief thereunder "in accordance with traditional equity practice, 'as conditioned by the necessities of public interest which Congress has sought to protect.'" *Morio v. North American Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980), quoting *Seeler v. The Trading Port, Inc.*, 517 F.2d at 39-40. In applying these principles the Second Circuit has concluded that Section 10(j) relief is warranted where serious and pervasive unfair labor practices threaten to render the Board's processes "totally ineffective" by precluding a meaningful final remedy (*Kaynard v. Mego Corp.*, 633 F.2d at 1034, discussing *Seeler v. The Trading Port, Inc.*, 517 F.2d at 37-38); or where interim relief is the only effective means to preserve or restore the status quo as it existed before the onset of the violations (*Seeler v. The Trading Port, Inc.*, 517 F.2d at 38); or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint (*Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at 1055). Accord: *Kreisberg v. HealthBridge Management*, LLC, 732 F.3d at 143; *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d at 368 (Section 10(j) relief "is just

and proper when it is necessary to prevent irreparable harm or to preserve the status quo"); *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 255 (S.D.N.Y.), aff'd. 67 F.3d 1054 (2d Cir. 1995).

APPENDIX D

THIRD CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 92-93 (3d Cir. 2011), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). Accord: *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990).

To resolve a Section 10(j) petition, a district court in the Third Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See, e.g., *Chester v. Grane Healthcare Co.*, 666 F.3d at 100; *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998); *Pascarell v. Vibra Screw Inc.*, 904 F.2d at 877; *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1078 (3d Cir. 1984).

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

APPENDIX D

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case and the Regional Director need not adduce evidence sufficient to prove a violation. See *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1083-1084. See also *Chester v. Grane Healthcare Co.*, 666 F.3d at 100 ("it is not [the court's] role to adjudicate the merits of the underlying claim"); *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906 (3d Cir. 1981) (improper for district court to pass upon ultimate issue of alleged proscribed employer motivation for discharges). Instead, the reasonable cause standard imposes a "low threshold of proof" on the Regional Director. See *Eisenberg v. Wellington Hall Nursing Home*, 651 F.2d at 905; *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084. This standard is satisfied as long as (1) the Regional Director's legal theory is "substantial and not frivolous" and (2) viewing contested factual issues favorably to the Board, sufficient evidence supports that theory. *Chester v. Grane Healthcare Co.*, 666 F.3d at 100, citing *Pascarell v. Vibra Screw Inc.*, 904 F.2d at 882. In making this examination, the district court should not attempt to resolve issues of credibility of witnesses. See *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 234 (6th Cir. 2003). Accord: *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983).

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) "when the nature of the alleged [violations] are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation." *Pascarell v. Vibra Screw Inc.*, 904 F.2d at 878. Thus, a district court must focus on the public interest in protecting the integrity of the bargaining process. *Chester v. Grane Healthcare Co.*, 666 F.3d at 99, citing *Pascarell v. Vibra Screw Inc.*, 904 F.2d at 876; *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d at 906-907. The "critical determination" for the court is "whether, absent an injunction, the Board's ability

to facilitate peaceful management-labor negotiation will be impaired." *Pascarell v. Vibra Screw Inc.*, 904 F.2d at 879. An injunction is appropriate when a failure to grant interim relief likely would "prevent the Board, acting with reasonable expedition, from effectively exercising its ultimate remedial powers." *Chester v. Grane Healthcare Co.*, 666 F.3d at ????? 2011 WL 6075963, slip op. at *13, citing *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1091-1092. Accord: *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000), citing *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967).

APPENDIX D

FOURTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 543-44 (4th Cir. 2009). See also *Scott v. Stephen Dunn & Assocs.*, 241 F.3d 652, 659 (9th Cir. 2001); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc), *quoting* S. Rep. No. 105, at 8, 27 (1947), *reprinted in* I NLRB, *Legislative History of the Labor-Management Relations Act, 1947*, at 414, 433 (1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See *Muffley*, 570 F.3d at 543-44.

Section 10(j) directs district courts to grant relief that is "just and proper." In the Fourth Circuit, district courts rely on traditional equitable principles to determine whether interim relief is appropriate. *Muffley*, 570 F.3d at 541-42. Accordingly, the Regional

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Director must establish (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in the Board's favor, and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).[2] The traditional equitable criteria, including the threat of irreparable harm, should be considered in the context of the underlying purpose of Section 10(j), which is to preserve the Board's remedial powers. *Muffley*, 570 F.3d at 543, *citing Miller*, 19 F.3d at 459-60.

A. Likelihood of Success

The Regional Director makes a threshold showing of likelihood of success by producing "some evidence" in support of the unfair labor practice charge "together with an arguable legal theory." *Muffley*, 570 F.3d at 541, *quoting Miller*, 19 F.3d at 460. In assessing whether the Regional Director has met this minimal burden, district courts must take into account that Section 10(j) confers no jurisdiction to pass on the ultimate merits of the unfair labor practice case and that, ultimately, the Board's determination on the merits will be given considerable deference. See *Bloedorn v. Francisco Foods, Inc*, 276 F.3d 270, 287 (7th Cir. 2001); *Miller*, 19 F.3d at 460, and cases there cited. In a 10(j) proceeding, the district court should sustain the Regional Director's factual allegations if they are "within the range of rationality" and, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Director], however novel." *Bloedorn*, 276 F.3d at 287; *Danielson v. Jt. Board*, 494 F.2d 1230, 1245 (2d Cir. 1974), *cited with approval in Miller*, 19 F.3d at 460. Finally, the district court should not resolve credibility conflicts in the evidence. E.g., *Scott*, 241 F.3d at 662; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996).

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[2] **[If a respondent argues that *Winter* impacts the Board's requisite showing in Section 10(j) cases, the Region should immediately consult with the Injunction Litigation Branch.]**

B. Balancing the Equities

In applying traditional equitable principles to a 10(j) petition, district courts should consider the matter through the "prism of the underlying purpose of Section 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." *Scott*, 241 F.3d at 661, *quoting Miller*, 19 F.3d at 459-60. The Fourth Circuit recognizes that the public interest is an important factor in the exercise of equitable discretion. *Muffley*, 570 F.3d at 543. Section 10(j) thus implements the public interest to protect the Board's remedial power from compromise by the passage of time inherent in obtaining an enforceable Board order. See *Muffley*, 570 F.3d at 544.

APPENDIX D

FIFTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). See also *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188 (5th Cir. 1975), reh. and reh. en banc denied 52l F.2d 795, cert. denied 426 U.S. 934 (1976).

To resolve a Section 10(j) petition, a district court in the Fifth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 851, 854 (5th Cir. 2010); *Overstreet*

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

v. El Paso Elec. Co., 176 Fed.Appx. 607, 609 (5th Cir. 2006) (per curiam). Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Glasser v. ADT Security Systems, Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010), citing *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 235 (6th Cir. 2003); *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir. 1992).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d at 1191. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 100; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. Rather, the district court's role in evaluating "reasonable cause" is limited to determining whether the Regional Director's "theories of law and fact are not insubstantial and frivolous." *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d at 1189. See also *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 850. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 100, 101.

As to questions of law, the district court should be hospitable to the views of the Regional Director, even if the legal theories relied on are considered novel or untested. *Boire v. Int'l Bhd. of Teamsters*, 479 F.2d 778, 789-92 (5th Cir. 1973); *Lewis v. New Orleans Clerks & Checkers, I.L.A. Local No. 1497*, 724 F.2d 1109, 1114-15 (5th Cir. 1984).[2] Accord: *Frankl v. HTH Corp.*, 650 F.3d 1334, 1356 (9th Cir. 2011).

[2] *Lewis* involved an injunction proceeding under Section 10(l) of the Act (29 U.S.C. § 160(l)). Section 10(l) is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated violations, such as secondary boycotts. The legal analysis under the two sections is basically the same. See, e.g., *Boire v. Int'l Bhd. of Teamsters*, 479 F.2d at 787 n.7.

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As to factual matters, the Regional Director need present only "enough evidence . . . to permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 851 n.10, 855, citing *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 371. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 100; *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1031 (2d Cir. 1980). Indeed, the Fifth Circuit rejects the requirement that the Board show a "heightened factual threshold" such as that found in the traditional four-part test for equitable relief utilized in other circuits. See *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 851. In determining whether the Regional Director has met the Fifth Circuit's "minimal burden of proof" (*Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 851 n.11, citing *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 371), a district court should not attempt to resolve conflicts in the evidence or the credibility of witnesses. See *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 372-73; *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in the evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in the evidence); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570-71 (7th Cir. 1996). Rather, courts should give the regional director's version of disputed facts the "benefit of the doubt." *Seeler v. Trading Port*, 517 F.2d 33, 36-37 (2d Cir. 1975).

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) to "prevent the destruction of employee interest in collective bargaining, irreparable injury to the union's bargaining power, and the undermining of the effectiveness of any resolution through the Board's process." *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 856. Accord: *Arlook*

v. S. Lichtenberg & Co. Inc., 952 F.2d at 372, 374 ("just and proper" standard met where Section 10(j) interim relief would be "more effective" to protect employee statutory rights than a final Board order); *Boire v. Int'l Bhd. of Teamsters*, 479 F.2d at 788 (interim relief warranted where, absent such relief, "Board processes would be of little avail" to the affected employees); *Chester v. Grane Healthcare Co.*, 666 F.3d at 102. Thus, in the Fifth Circuit, the question is one of "equitable necessity," that is, whether interim relief is necessary to preserve the lawful status quo ante pending the Board's ultimate administrative adjudication. *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 857. Accord: *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation"); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454-55 (1st Cir. 1990) (same).

APPENDIX D

SIXTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 970 (6th Cir. 2001); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 436-437 (6th Cir. 1979), quoting S. Rep. No. 105, 80th Cong., 1st Sess., 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 433 (Government Printing Office 1985). Accord: *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 28-29 (6th Cir. 1988). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See *Kobell v. United Paperworkers Intern.*, 965 F.2d 1401, 1406 (6th Cir. 1992).

To resolve a Section 10(j) petition, a district court in the Sixth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

violated the Act and whether temporary injunctive relief is "just and proper." See *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 234-235 (6th Cir. 2003); *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 969; *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987); *Glasser v. ADT Security Systems, Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010). Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850-851, 854 (5th Cir. 2010).

A. The "Reasonable Cause" Standard

The Regional Director bears a “relatively insubstantial” burden in establishing “reasonable cause.” *Ahearn v. Jackson Hospital*, 351 F.3d at 237. In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case. Id. See also *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 969; *Gottfried v. Frankel*, 818 F.2d at 493. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 100. Instead, the Regional Director's burden in proving "reasonable cause" is "relatively insubstantial." See *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 969; *Kobell v. United Paperworkers Intern.*, 965 F.2d at 1406; *Levine v. C & W Mining Co., Inc.*, 610 F.2d at 435. Thus, the district court must accept the Regional Director's legal theory as long as it is "substantial and not frivolous." *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237; *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d at 29; *Kobell v. United Paperworkers Intern.*, 965 F.2d 1407. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 101; *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 850, 855. Factually, the Regional Director need only "produce some evidence in support of the petition." *Kobell v. United Paperworkers Intern.*, 965 F.2d at 1407. The district court should not resolve conflicts in the evidence or issues of credibility of witnesses, but should accept the Regional Director's version of events as long as facts exist which could support the Board's theory of liability. See *Ahearn v. Jackson Hospital*, 351 F.3d at 237; *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 969; *Gottfried v. Frankel*, 818 F.2d at 493, 494.

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B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) where it is "necessary to return the parties to the status quo pending the Board's processes in order to protect the Board's remedial powers under the NLRA." *Kobell v. United Paperworkers Intern.*, 965 F.2d at 1410, quoting *Gottfried v. Frankel*, 818 F.2d at 495.[2] Accord: *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d at 970. Thus, "[i]nterim relief is warranted whenever the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless.'" *Sheeran v. American Commercial Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982), quoting *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967). Accord: *Ahearn v. Jackson Hospital*, 351 F.3d at 239; *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d at 30-31; *Chester v. Grane Healthcare Co.*, 666 F.3d at 102.

[2] The "status quo" referred to in *Gottfried v. Frankel* is that which existed before the charged unfair labor practices took place. See *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d at 30 n.3.

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SEVENTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. See *Harrell v. American Red Cross*, 714 F.3d 553, 556 (7th Cir. 2013); *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 499 (7th Cir. 2008); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir.2001). Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985), cited in *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 891 (7th Cir. 1990). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See *Lineback v. Irving Ready-Mix Inc.*, 653 F.3d 566,

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

570 (7th Cir. 2011); *Lineback v. Spurlino Materials, LLC*, 546 F.3d at 500; *Kinney v. Pioneer Press*, 881 F.2d 485, 493-494 (7th Cir. 1989).

Section 10(j) directs district courts to grant relief that is "just and proper." The Seventh Circuit holds that to determine what relief is "just and proper," district courts should apply the general equitable standards for considering requests for preliminary injunctions. *Lineback v. Spurlino Materials, LLC*, 546 F.3d at 499-500; *Bloedorn v. Francisco Foods*, 276 F.3d at 286; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1566 (7th Cir. 1996); *Kinney v. Pioneer Press*, 881 F.2d at 490. The Regional Director is entitled to interim relief when: (1) the Director has no adequate remedy at law; (2) the labor effort would face irreparable harm without interim relief, and the prospect of that harm outweighs any harm posed to the employer by the proposed injunction; (3) "public harm" would occur in the absence of interim relief; and (4) the Director has a reasonable likelihood of prevailing on the merits of his complaint. *Harrell v. American Red Cross*, 714 F.3d at 556; *Lineback v. Spurlino Materials, LLC*, 546 F.3d at 500; *Bloedorn v. Francisco Foods*, 276 F.3d at 286. The Director bears the burden of establishing the first, third and fourth prongs by a preponderance of the evidence. *Lineback v. Spurlino Materials, LLC*, 546 F.3d at 500; *Bloedorn v. Francisco Foods*, 276 F.3d at 286. "The second prong is evaluated on a sliding scale: The better the Director's case on the merits, the less its burden to prove that the harm in delay would be irreparable, and vice versa." *Lineback v. Spurlino Materials, LLC*, 546 F.3d at 500, *quoting Bloedorn v. Francisco Foods*, 276 F.3d at 286, 298. See also *Hoosier Energy Rural Elec. Coop, Inc. v. John*

Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009); *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010).[2]

A. Likelihood of Success

The Regional Director makes a threshold showing of likelihood of success by showing that its chances are "better than negligible." *Lineback v. Spurlino Materials, LLC,* 546 F.3d at 502; *NLRB v. Electro-Voice*, 83 F.3d at 1568. In assessing whether the Regional Director has met this burden, a district court must take into account that Section 10(j) confers no jurisdiction to pass on the ultimate merits of the unfair labor practice case, *Lineback v. Spurlino Materials, LLC*, 546 F.3d at 502; *NLRB v. Electro-Voice*, 83 F.3d at 1567, and that, ultimately, the Board's determination on the merits will be given considerable deference, *Bloedorn v. Francisco Foods*, 276 F.3d at 287. Thus, in a 10(j) proceeding, the district court should determine whether "the Director has 'some chance' of succeeding on the merits." *Harrell v. American Red Cross*, 714 F.3d at 556; *Lineback v. Spurlino Materials, LLC*, at 502. The district court should not resolve credibility conflicts in the evidence. *NLRB v. Electro-Voice*, 83 F.3d at 1570, 1571. See also *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987).

B. Balancing the Equities

The irreparable harm to be avoided in a Section 10(j) case is the threatened frustration of the remedial purpose of the Act and of the public interest in deterring continued violations. *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 744 (7th Cir. 1976), cited with approval in *Kinney v. Pioneer Press*, 881 F.2d at

[2] **[If a respondent questions whether a sliding scale test can be used post-*Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), the Region should contact the Injunction Litigation Branch.]**

491.[3] In evaluating whether irreparable injury to the policies of the Act is threatened, as well as in balancing such harms against any threatened harm to the respondent or the public interest, the district court must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Miller v. California Pacific*, 19 F.3d at 460, citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Accord: *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 455 (1st Cir. 1990) (Section 10(j) relief is appropriate whenever the circumstances create a reasonable apprehension that, absent an injunction, the efficacy of the Board's final order may be nullified or frustrated during regular Board litigation). "In appropriate circumstances, the same evidence that establishes the Director's likelihood of proving a violation of the NLRA may provide evidentiary support for a finding of irreparable harm." *Bloedorn v. Francisco Foods*, 276 F.3d at 297-98. See also *Harrell v. American Red Cross*, 714 F.3d at 557.**[[4]]** "[T]he interest at stake in a section 10(j) proceeding is 'the public interest in

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[3] *NLRB v. Electro-Voice* notes that when equitable relief is the ultimate relief sought, an additional element "no adequate remedy at law" is part of traditional equity analysis for which petitioner must show that an award of damages would be "seriously deficient." 83 F.3d at 1567, quoting *Roland Machinery v. Dresser Industries*, 749 F.2d 380, 386-87 (7th Cir. 1984). As here, a Board proceeding resulting in permanent injunctive relief is the sole avenue of relief for conduct made unlawful under the National Labor Relations Act. Thus, in Section 10(j) cases, the "adequate remedy at law" inquiry is whether, in the absence of immediate relief, the harm flowing from the alleged violation cannot be prevented or fully rectified by the final judgment. *Id.* at at 386; *Harrell v. American Red Cross*, 714 F.3d at 557. This inquiry effectively is the same as the question of "irreparable harm" to the petitioner. *NLRB v. Electro-Voice*, 83 F.3d at 1572-73.

[4] **[If the Region also has independent evidence that the violations have caused irreparable harm, it should assert in the argument section that this evidence, while not required, additionally supports the need for interim relief. See** *Lineback v. Irving Ready-Mix Inc.***, 653 F.3d at 570 ("circumstances such as … a decline in the union's membership, loss of employee benefits, and ongoing erosion of the employer-union relationship" are "sufficient to establish irreparable harm").]**

the integrity of the collective bargaining process.'" *Bloedorn v. Francisco Foods*, 276 F.3d at 300, quoting *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906-07 (3d Cir. 1981). See also *Harrell v. American Red Cross*, 714 F.3d at 557.

APPENDIX D

EIGHTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See *Minnesota Mining and Manufacturing Co. v. Meter*, 385 F.2d 265, 269-270 (8th Cir. 1967) (citing S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947), *reprinted in* I NLRB, *Legislative History of the Labor-Management Relations Act, 1947*, at 414, 433 (1985)). Thus, Congress intended for Section 10(j) to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *Minnesota Mining*, 385 F.2d at 271 (citing *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967)). Accord: *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000).

Section 10(j) directs district courts to grant relief that is "just and proper." In the Eighth Circuit, district courts apply a traditional equitable analysis to consider whether

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

interim relief is just and proper. *Osthus v. Whitesell*, 639 F.3d 841, 844-845 (8th Cir. 2011); *Sharp v. Parents in Community Action, Inc.*, 172 F.3d 1034, 1039 (8th Cir. 1999). That is, the court must evaluate: "1) the threat of irreparable harm to the movant; 2) the balance between the harm to the movant and the harm to other parties if the injunction is granted; 3) the movant's probability of success on the merits; and 4) the public interest." *Parents in Community Action*, 172 F.3d at 1038, n.2 (citing *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc)). In evaluating the warrant for interim relief, the court must take a flexible and pragmatic approach in balancing the factors, and no one factor is determinative. *Dataphase Systems*, 640 F.2d at 113. Where the irreparable harm to the movant is greater than the possible injury to other parties, the need to show likelihood of success is lower, and conversely, where the harm is greater to the other parties than to the movant, the burden of showing likelihood of success is great. *Dataphase Systems*, 640 F.2d at 112-113. See *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 961 (8th Cir. 1995) ("preliminary injunctions become easier to obtain as the plaintiff faces progressively graver harm"); *Hoosier Energy Rural Elec. Coop, Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) ("the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be"). In any case, the movant must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 992 (8th Cir. 2011), quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).

A. Balancing the Equities

In deciding whether a Section 10(j) injunction is "just and proper," the court focuses initially on the question of irreparable injury. *Parents in Community Action*, 172

F.3d at 1039. The irreparable harm to be avoided in a Section 10(j) case is the "harm to the collective bargaining process or to other protected employee activities if a remedy must await the Board's full adjudicatory process." *Id.* at 1038, 1040. An interim injunction is appropriate when it is "necessary either to preserve the status quo or prevent frustration of the basic remedial purposes of the Act." *Parents in Community Action*, 172 F.3d at 1039 (quoting *Minnesota Mining*, 385 F.2d at 270).

In evaluating whether irreparable injury to the policies of the Act is threatened, as well as in balancing such harms against any threatened harm to the respondent or the public interest, the district court must take into account the probability that declining to issue the injunction will permit the "alleged unfair labor practice to reach fruition and thereby render[] meaningless the Board's remedial authority… ." *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011), quoting *Frankl v. HTH Corp.*, 650 F.3d 1334, 1362 (9th Cir. 2011). And, granting interim injunctive relief to strengthen the collective-bargaining process serves the public interest. See *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 300 (7th Cir. 2001) ("the interest at stake in a section 10(j) proceeding is 'the public interest in the integrity of the collective bargaining process'"); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 455 (1st Cir. 1990).

B. Likelihood of Success

Once the Regional Director has established irreparable injury, the district court examines likelihood of success on the merits, not in isolation, but "in the context of the relative injuries to the parties and the public." *Parents in Community Action*, 172 F.3d at 1039 (quoting *Dataphase Systems*, 640 F.2d at 113). In evaluating the likelihood of success, the district court considers only whether there are "suspected" statutory

violations. *Parents in Community Action*, 172 F.3d at 1038. In assessing whether the Regional Director has met this requirement, the district court must take into account that it has no jurisdiction under Section 10(j) to adjudicate the merits of an unfair labor practice case. *Parents in Community Action*, 172 F.3d at 1039; *Frankl v. HTH Corp.*, 650 F.3d at 1356. The court must also factor in the deference accorded to the Board's determination on the merits by courts of appeals. *Frankl v. HTH Corp.*, 650 F.3d at 1356. See also *NLRB v. Swift Adhesives*, 110 F.3d 632, 634 (8th Cir. 1997) (Eighth Circuit reviews a final Board order "with great deference"); *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1265 (7th Cir. 1987). The district court should sustain the Regional Director's factual allegations if they are "within the range of rationality," and "[e]ven on an issue of law, the district court should be hospitable to the views of the [Director], however novel." *Danielson v. Joint Board*, 494 F.2d 1230, 1245 (2d Cir. 1974), cited with approval in *Miller v. California Pacific Medical Center*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc). See also *Frankl v. HTH Corp.*, 650 F.3d at 1356. The district court should not resolve credibility conflicts in the evidence, but rather focus on whether the Regional Director's evidence is sufficient to show a "better than negligible" chance of success. *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996). See also *Frankl v. HTH Corp.*, 650 F.3d at 1356; *Small v. Avanti Health Systems, LLC*, 661 F.3d at 1190.

APPENDIX D

NINTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions that are "just and proper" pending the Board's resolution of unfair labor practice proceedings. 29 U.S.C. § 160(j)[1] Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint. *See Scott v. Stephen Dunn & Associates*, 241 F.3d 652, 659 (9th Cir. 2001); *Miller v. California Pacific Medical Center*, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. at 8, 27 reprinted in 1 Leg. Hist. 414, 433 (LMRA 1947)).

In the Ninth Circuit, district courts rely on traditional equitable principles to determine whether interim relief is appropriate. *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180 (9th Cir. 2011); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011). Thus, to obtain a preliminary injunction, the Regional Director must establish (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in the Board's favor, and (4) that an injunction is in the public interest. *Frankl*, 650 F.3d at 1355 (citing *Winter v. Natural*

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Resources Defense Council, Inc., 555 U.S. 7, 129 S.Ct. 365, 374 (2008)). These elements are evaluated on a "sliding scale" in which the required showing of likelihood of success decreases as the showing of irreparable harm increases. *See Alliance for the Wild Rockies v. Cotrell,* 632 F.3d 1127, 1131-1134 (9th Cir. 2011). When "the balance of hardships tips sharply" in the Director's favor, the Director may establish only that "serious questions going to the merits" exist so long as there is a likelihood of irreparable harm and the injunction is in the public interest. *Frankl,* 650 F.3d at 1355 (quoting *Alliance for the Wild Rockies*, 632 F.3d at 1135). The "serious questions" standard permits the district court to grant an injunction where it "cannot determine with certainty that the [Director] is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction." *Alliance for the Wild Rockies,* 632 F.3d at 1133 (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010)).

A. Likelihood of Success

Likelihood of success in a § 10(j) proceeding "is a function of the probability that the Board will issue an order determining that the unfair labor practices alleged by the Regional Director occurred and that the Ninth Circuit would grant a petition enforcing that order." *Frankl,* 650 F.3d at 1355. S*ee also Small*, 661 F.3d at 1187. In evaluating the likelihood of success, "it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals." *Frankl,* 650 F.3d at 1356 (quoting *Miller,* 19 F.3d at 460). The Regional Director need not prove, however, that the respondent committed the alleged unfair labor practices by a preponderance of the evidence as required in the underlying administrative proceeding. *See Scott,* 241 F.3d at 662. Such a standard would "improperly equat[e] 'likelihood of success' with 'success.'" *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981).

Rather, the Regional Director makes a threshold showing of likelihood of success by producing "some evidence" in support of the unfair labor practice charge "together with an arguable legal theory." *Small*, 661 F.3d at 1187 (quoting *Frankl*, 650 F.3d at 1356). *See also* S*cott*, 241 F.3d at 662 (the Regional Director need only show "a better than negligible chance of success"). Therefore, in a § 10(j) proceeding, the district court should sustain the Regional Director's factual allegations if they are "within the range of rationality" and, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Regional Director], however novel." *Frankl*, 650 F.3d at 1356. "A conflict in the evidence does not preclude the Regional Director from making the requisite showing for a section 10(j) injunction." *Scott*, 241 F.3d at 662.

B. Balancing the Equities

In applying traditional equitable principles to a § 10(j) petition, courts must consider the matter in light of the underlying purpose of § 10(j), which is "to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." *Miller*, 19 F.3d at 459-60. In evaluating the likelihood of irreparable harm to the Act's policies and in considering the balancing of equities, district courts must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Id*. See also *Small*, 661 F.3d at 1191; *Frankl*, 650 F.3d at 1362.

Likely irreparable injury is established in a § 10(j) case by showing "a present or impending deleterious effect of the likely unfair labor practice that would likely not be cured by later relief." *Frankl*, 650 F.3d at 1362. The Director can make the requisite

showing of likely irreparable harm either through evidence that such harm is occurring, *see, e.g., Scott,* 241 F.3d at 667, 668, or from "inferences from the nature of the particular unfair labor practice at issue [which] remain available." *Frankl,* 650 F.3d at 1362. The same evidence and legal conclusions establishing likelihood of success, together with permissible inferences regarding the likely interim and long-run impact of the likely unfair labor practices, provide support for a finding of irreparable harm. *Small,* 661 F.3d at 1191 (quoting *Frankl,* 650 F.3d at 1363).

[For 8(a)(3) discharge violations, add to irreparable section of brief: "[A] likelihood of success as to a § 8(a)(3) violation with regard to union activists that occurred during contract negotiations or an organizing drive largely establishes likely irreparable harm, absent unusual circumstances." *Frankl,* 650 F.3d at 1363.]

[For 8(a)(5) violations, add to irreparable harm section of brief: Continuation of §8(a)(5) violations involving the failure to bargain in good faith "has long been understood as likely causing an irreparable injury to union representation." *Frankl,* 650 F.3d at 1362. See also *Small,* 661 F.3d at 1191. "[E]ven if the Board subsequently orders a bargaining remedy, the union is likely weakened in the interim, and it will be difficult to recreate the original status quo with the same relative position of the bargaining parties. That difficulty will increase as time goes on. And the Board generally does not order retroactive relief, such as back pay or damages, to rank-and-file employees for the loss of economic benefits that might have been obtained had the employer bargained in good faith." *Frankl,* 650 F.3d at 1363.]

APPENDIX D

The public interest in a Section 10(j) case "is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Frankl*, 650 F.3d at 1365, *quoting Miller*, 19 F.3d at 460. *See also Small*, 661 F.3d at 1197. A strong showing of likelihood of success and of likely irreparable harm will establish that Section 10(j) relief is in the public interest. *Frankl*, 650 F.3d at 1365. *See also Bloedorn*, 276 F.3d at 300.

APPENDIX D

TENTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985), cited in *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000) and *Angle v. Sacks*, 382 F.2d 655, 659-660 (10th Cir. 1967). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. Id. at 659. Accord: *Kobell v. United Paperworkers Intern.*, 965 F.2d 1401, 1406 (6th Cir. 1992).

To resolve a Section 10(j) petition, a district court in the Tenth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

violated the Act and whether temporary injunctive relief is "just and proper." See *Sharp v. Webco Industries,* 225 F.3d at 1133, 1137; *Angle v. Sacks,* 382 F.2d at 658, 660. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850-851, 854 (5th Cir. 2010); *Glasser v. ADT Security Systems, Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010), citing *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 235 (6th Cir. 2003).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court in the Tenth Circuit may not decide the ultimate merits of the case. *Angle v. Sacks,* 382 F.2d at 661 (merits of unfair labor practice allegations to be resolved by the Board). Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 100; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. Rather, the Regional Director "must only produce some evidence 'that [its] position is fairly supported by the evidence.'" *Sharp v. Webco Industries,* 225 F.3d at 1134, quoting *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 450 (1st Cir. 1990). Further, the Regional Director need only advance legal theories that are "valid, substantial and not frivolous" in order to "permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *Sharp v. Webco Industries,* 225 F.3d at 1134, quoting *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir. 1992). Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 101; *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 850, 855; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. The district court should not resolve contested factual issues. See *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. Nor should it attempt to resolve issues of credibility of witnesses. See *Ahearn v.*

Jackson Hospital Corp., 351 F.3d at 237; *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence).

B. The "Just and Proper" Standard

Section 10(j) implements the public interest to protect the Board's remedial power from compromise by the passage of time inherent in obtaining an enforceable Board order. Thus, for Section 10(j) relief to be just and proper, "the circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted." *Sharp v. Webco Industries*, 225 F.3d at 1135, quoting *Angle v. Sacks*, 382 F.2d at 660. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 102; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 239. Accordingly, the relief to be granted is that which will preserve, or restore as nearly as possible, the status quo existing before the alleged unfair labor practices occurred. See *Angle v. Sacks*, 382 F.2d at 661. See also *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation").

APPENDIX D

ELEVENTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). See also *NLRB v. Hartman and Tyner, Inc.*, 714 F.3d 1244, 1249 (11th Cir. 2013); *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir. 1992), quoting *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188 (5th Cir. 1975), reh. and reh. en banc denied 52l F.2d 795, cert. denied 426 U.S. 934 (1976).

To resolve a Section 10(j) petition, a district court in the Eleventh Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether injunctive relief is "just and proper." See

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

NLRB v. Hartman and Tyner, Inc., 714 F.3d at 1250; *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 371. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850-851, 854 (5th Cir. 2010); *Glasser v. ADT Security Systems, Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010), citing *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 235 (6th Cir. 2003).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 372-373, citing *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d at 1191. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 100; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. Rather, the district court's role is limited to evaluating whether (1) the Regional Director's theory of violation is "substantial, nonfrivolous [and] coherent" and (2) the evidence, considered in the light most favorable to the Board, would permit a rational factfinder to rule in the Board's favor. *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 371-372. Accord: *Boire v. Int'l Bhd. of Teamsters*, 479 F.2d 778, 789-92 (5th Cir. 1973), reh. and reh. en banc denied 480 F.2d 924 (1973) (legal theories need only be "substantial and not frivolous"); *Chester v. Grane Healthcare Co.*, 666 F.3d at 101; *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 850, 855; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. In determining whether the Regional Director has met this "minimal burden" (*Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d at 1189), a district court should not attempt to resolve conflicts in the evidence or the credibility of witnesses. *Arlook v. Lichtenberg & Co., Inc.*, 952 F.2d at 372-373; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237; *Gottfried v. Frankel*, 818 F.2d 485, 493, 494

(6th Cir. 1987) (respondent's attack on credibility of Board's witnesses merely establishes conflict in the evidence).

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) "whenever the facts demonstrate that, without such relief, any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the NLRA will be frustrated." *NLRB v. Hartman and Tyner, Inc.*, 714 F.3d at 1250, quoting *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 372. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 102; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 239. In the Eleventh Circuit, injunctive relief is shown to be "equitably necessary" where, for example, union organizational efforts are being extinguished by employer unfair labor practices, unions and employees have already suffered substantial damage from probable violations and future violations are likely to be repeated absent an injunction. *NLRB v. Hartman and Tyner, Inc.*, 714 F.3d at 1250; *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 372. Therefore, it is "just and proper" for a district court to grant interim relief where a Section 10(j) injunction would be "more effective" to protect employee statutory rights than a final Board order. *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 374. Accord: *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation."); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454-455 (1st Cir. 1990) (same).

APPENDIX D

D.C. CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at *I Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See, e.g., *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000); citing *Angle v. Sacks*, 382 F.2d 655, 659 (10th Cir. 1967); *Kobell v. United Paperworkers International Union*, 965 F.2d 1401, 1406 (6th Cir. 1992).

To resolve a 10(j) petition, the district court in the District of Columbia considers only two issues: whether there is "reasonable cause to believe" that the Act has been

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

violated and whether the "remedial purposes of the law will be served by pendente lite [injunctive] relief." See *Int'l. Union, U.A.W. v. NLRB (Ex-Cell-O Corp.)*, 449 F.2d 1046, 1051 (D.C. Cir. 1971) (Section 10(e) (29 U.S.C. Section 160(e)) temporary injunction case; "in order to obtain temporary relief under § 10(j) or § 10(e), the Board need only establish that there is reasonable cause to believe that the Act has been violated, and that remedial purposes of the law will be served by pendente lite relief").[2] The "usually strict standards for equitable relief in private actions do not apply when [] important public purposes are threatened." *Int'l. Union, U.A.W. v. NLRB (Ex-Cell-O Corp.)*, 449 F.2d at 1051. Several circuits have adopted this two part standard, the second half of which is also characterized as whether temporary injunctive relief is "just and proper." See, e.g., *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850-851, 854 (5th Cir. 2010); *Glasser v. ADT Security Systems, Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010), citing *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 235 (6th Cir. 2003); *Sharp v. Webco Industries,*

[2] The four-part test articulated by the district court in *Gold v. State Plaza, Inc.*, 435 F. Supp. 2d 110, 118-119 (D. D.C. 2006) and *D'Amico v. U.S. Service Industries, Inc.*, 867 F.Supp. 1075, 1085 (D. D.C. 1994), is not binding on the district court in this case. *Fund for Animals v. Mainella*, 335 F. Supp. 2d 19, 27 (D. D.C. 2004) ("a decision by a district court has no precedential effect"); *Flowers v. Executive Office of the President*, 142 F. Supp. 2d 38, 42 (D. D.C. 2001) (same). In any event, even under the four-part test, the Board's strong "likelihood of success" on the merits supports the issuance of an injunction, the need for interim relief outweighs any minimal harm to the Employer, and injunctive relief is in the public interest. See *Gold v. State Plaza, Inc.*, 435 F. Supp. 2d at 119 (the "public interest … lies in ensuring that the purposes of the statute are furthered and that the processes of the Board, and any ultimate remedies it imposes are effective").

The Region should be aware that Circuit Rule 18(a)(1) ("Stay and Emergency Relief Pending Review of an Agency Order") indicates that the D.C. Circuit may now be inclined to apply the four-part test when examining an injunction petition brought under Section 10(e). If a Respondent raises Circuit Rule 18(a)(1), the Region should argue that *Ex-Cell-O Corp.* is still controlling law in the D.C. Circuit, and, in any event, the two-part test should apply because Section 10(j) encompasses emergency relief pending action by the Board, not by the Court of Appeals.

Inc., 225 F.3d 1130, 1133, 1137 (10th Cir. 2000); *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir. 1992).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the ultimate merits of the case. *Angle v. Sacks*, 382 F.2d at 661 (merits of unfair labor practice allegations to be resolved by the Board); *Chester v. Grane Healthcare Co.*, 666 F.3d at 100; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. Rather, the Regional Director "must only produce some evidence 'that [its] position is fairly supported by the evidence.'" *Sharp v. Webco Industries*, 225 F.3d at 1134, quoting *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 450 (1st Cir. 1990). Further, the Regional Director need only advance legal theories that are "valid, substantial and not frivolous" in order to "permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *Sharp v. Webco Industries*, 225 F.3d at 1134, quoting *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d at 371. Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 101; *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 850, 855; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. The district court should not resolve contested factual issues. See *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237. Nor should it attempt to resolve issues of credibility of witnesses. See *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 237; *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence).

APPENDIX D

B. The "Just and Proper" Standard

As the District of Columbia Circuit has recognized, interim injunctive relief is appropriate to protect the remedial purposes of the Act and, in particular, to preserve the Board's remedial powers from compromise by the passage of time inherent in obtaining a Board order. *Int'l. Union, U.A.W. v. NLRB (Ex-Cell-O Corp.)*, 449 F.2d at 1051. Thus, Section 10(j) relief is appropriate when "the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless" unless such relief is granted. *Angle v. Sacks*, 382 F.2d at 660**,** cited in *Sharp v. Webco Industries, Inc.*, 225 F.3d at 1133-1135; *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990) (injunctive relief is warranted when the alleged violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation"). Accord: *Chester v. Grane Healthcare Co.*, 666 F.3d at 102; *Ahearn v. Jackson Hospital Corp.*, 351 F.3d at 239. In determining what interim relief is "just and proper," the district court should consider what is necessary to preserve or restore as nearly as possible the status quo before the alleged violations occurred. See *Sharp v. Webco Industries, Inc.*, 225 F.3d at 1134, citing *Angle v. Sacks*, 382 F.2d at 661; *Kobell v. United Paperworkers International Union*, 965 F.2d at 1410; *Int'l. Union, U.A.W. v. NLRB (Ex-Cell-O Corp.)*, 449 F.2d at 1051, n.25.

APPENDIX E

List of Court Cases for Each 10(j) Category and Relevant Law Review Articles

REVISED November 2013

[W= win; L= loss]
[***** = more important case]
(parenthetical indicates additional issues addressed in the case)

I. SECTION 10(j) CASES BY CATEGORY[1]

1. Interference with Organizational Campaign (no majority)

Circuit Court decisions:

Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967) (W)
(classic "nip in the bud" case)

Aguayo v. Tomco Carburetor, 853 F.2d 744 (9th Cir. 1988) (W)
(discharge of union organizing committee members; protect potential collective-bargaining process; job rights of replacements subordinate to reinstatement rights discriminatees; good language on delay)

Sharp v. Parents in Cmty. Action, Inc., 172 F.3d 1034 (8th Cir. 1999) (L)
(no public interest served by reinstatement of single 8(a)(3) where no ongoing union campaign)[*]

Sharp v. Webco Indus., 225 F.3d 1130 (10th Cir. 2000) (W)
(discriminatory selection for layoffs; union attempting to revive stalled campaign; good language on delay)[*]

Pye v. Excel Case Ready, 238 F.3d 69 (1st Cir. 2001) (W)
(loss of union support coincides with unlawful discharges)

Schaub v. W. Mich. Plumbing & Heating, Inc., 250 F.3d 962 (6th Cir. 2001) (W)
(reinstatement of single 8(a)(3) in early stages of campaign)

NLRB v. Hartman and Tyner, Inc., 714 F.3d 1244 (11th Cir. 2013), *aff'g* 2012 WL 2513485 (S.D. Fl. June 29, 2012) (W on c&d order & affirm.

[1] For a description of the case categories, see the Section 10(j) Manual, Section 2.1

order for ee names and addresses, L on reinstatement of six employees & all other affirm. provs.)(denies interim reinstatement b/c of Board's 4 mo. Delay (applies *Boire v. Pilot Freight* case contrary to 5th Cir's later *El Paso Disposal* decision), chill from discharges had already occurred, and U camp. had "grown cold" before discharges)

McDermott v. Ampersand Pub'g, 593 F.3d 950 (9th Cir. 2010) (L)
(8(a)(3) discharges where ee's/U sought to have ER uphold "journalistic ethics"; inj. denied under 9th Cir's heightened standard for granting inj. where inj. could infringe upon respondent's 1st Amend. rights bc it would require ER to reinstate ee's who, through "journalistic ethics" demands, could conceivably seek to control what newspaper printed)

District Court decisions:

NLRB v. Ona Corp., 605 F. Supp. 874 (N.D. Ala. 1985) (W)
(single 8(a)(3); good evidence of "chilling" impact)

Silverman v. Whittal & Shon, 125 LRRM 2150, 1986 WL 15735, *1 (S.D.N.Y. 1986) (W)
(good language on "chill"; "no other worker in his right mind would participate")

Hoffman v. Cross Sound Ferry Serv., 109 LRRM 2884 (D. Conn. 1982)
(good language on chill)

Sharp v. La Siesta Foods, Inc., 859 F. Supp. 1370 (D. Kan. 1994) (L)
(union lost election, campaign had stopped and no post-election violations)[*]

D'Amico v. U.S. Service Indus., 867 F. Supp. 1075 (D. D.C. 1994) (W)
(inform unit employees about terms of decree; multi-site in scope; rejects "unclean hands" defense)

Fleischut v. Avondale Indus., 148 LRRM 2685 (E.D. La. 1995) (L)
(insufficient showing of irreparable harm to union's campaign)

Blyer v. P & W Elec., Inc., d/b/a Pollari Electric, 141 F. Supp.2d 326 (E.D.N.Y. 2001) (W)
(reinstatement of 3 employees in unit of 15)

Johnson v. Sunshine Piping, Inc., 238 F. Supp. 2d 1297 (N.D. Fl. 2002) (L)
(insufficient showing of irreparable harm to union's campaign)

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Chavarry v. E.L.C. Elec., Inc., 2004 WL 2137644
(S.D. Ind. 2004) (W)
(ULPs followed unresolved election)

Lineback v. Frye Elec., Inc.,
539 F. Supp.2d 1111 (S.D. Ind. 2008) (W)
(interim reinstatement of 2 employees)

Hoffman v. Pennant Foods Co.,
2008 WL 1777382 (D. Conn. 2008) (W/L) (interim reinstatement of union leader after two lost elections; however, other remedies, including union access, not just and proper)

Hooks v. Ozburn-Hessey Logistics
775 F.Supp.2d 1029 (W.D. Tenn. 2011)(W)
(discharges during organizing campaign)

Muffley v. Jewish Hosp. & St. Mary's Healthcare, Inc., 2012 WL 1576143 (W.D. Ky, May 3, 2012) (W reinstatement, L on notice posting & reading)(good language on discharge of prominent U supporter and on delay; ER cannot use defense of lack of U support to support arg. of no chill where ER engaged in other ulps designed to dampen interest in U)

Overstreet v. Santa Fe Tortilla Co., 2013 WL 3921178 (D.N.Mex., July 26, 2013) (W) (discharge of 2 ees for PCA & a U activities; good lang. on delay (6 mos bet. discharge & 10(j) pet.))

Fernbach v. Raz Dairy, 881 F.Supp.2d 452 (S.D.N.Y. 2012) (W)
(8(a)(3) disch. of ee identified as U ringleader & mult. 8(a)(1)'s; good lang. re: reinstatement is for benefit of remaining ees and not the discriminatee; good lang re: how reinstatement after Bd order permits irrep. harm & insuff. to preserve the status quo as it existed before ULPs; orders notice reading)

Rubin v. Am. Reclamation, 2012 WL 3018335 (C.D. Cal., July 2012) (W)
(substantial 8(a)(1)'s, including threat of facility closure & numerous 8(a)(3) discharges; good lang. re: irrep. harm & scattering)

Barker v. Latino Express, Inc., 2012 WL 1339624 (N.D. Ill., Apr. 18, 2012) (W) (substantial 8(a)(1)'s, include. threat of facility closure & numerous 8(a)(3) dischs.; orders Spanish trans. notice posting).

Fernbach v. 3915 9th Ave. Meat & Produce, 870 F.Supp.2d 342 (S.D.N.Y. 2012) (W) (nip-in-the-bud case w/ 5 discharges; good discuss. of chill evod. where discharges killed U campaign)

Overstreet v. Albertson's, LLC, 868 F.Supp.2d 1182 (D. N.Mex. 2012) (W) (8(a)(3) disch., surveillance, & other 8(a)(1)'s; good lang re: delay & how dist. ct. does not evaluate credibility or resolve disputed facts in analyzing r/c)

2. Interference with Organizational Campaign (majority)

Circuit Court decisions:

Seeler v. The Trading Port, 517 F.2d 33 (2d Cir. 1975) (W) (correct view of status quo)[*****]

Boire v. Pilot Freight Carriers, 515 F.2d 1185 (5th Cir. 1975) (L) (incorrect view of status quo)[*****]

Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979) (W) (also read the district court opinion)

Kaynard v. Palby Lingerie, 625 F.2d 1047 (2d Cir. 1980) (W) (disputed unit not bar to relief; good language on risk of error; employer can condition cba on Board sustaining GC's complaint)

Kaynard v. MMIC, 734 F.2d 950 (2d Cir. 1984) (W) (unresolved election not bar to relief)

Asseo v. Pan Am. Grain Co., 805 F.2d 23 (1st Cir. 1986) (W) (quotes D.C. Circuit in *Tiidee*)

NLRB v. Electro-Voice, Inc., 83 F.3d 1559 (7th Cir. 1996) (W) (follows *Seeler* view of status quo; good language on need to reinstate; employer retains right to discipline for cause)[*****]

Scott v. Stephen Dunn & Assocs, 241 F.3d 652 (9th Cir. 2001) (W) (8(a)(1) *Gissel*; costs of collective bargaining not bar to interim relief)

District Court decisions:

Gottfried v. Mayco Plastics, 472 F. Supp. 1161 (E.D. Mich. 1979), *aff'd mem.*, 615 F.2d 1360 (6th Cir. 1980) (W) (union lost election; mass reinstatement; rejects defense that employer already made offers of recall; also good language on delay)

Lightner v. Dauman Pallet, Inc., 823 F. Supp. 249
(D. N.J. 1992) (W)
(has good evidentiary ruling on "chilling" impact)

Garner v. Macclenny Prods., Inc., 859 F. Supp. 1478
(M.D. Fla. 1994) (W) (only 8(a)(1) violations;
unresolved election)

Hoeber v. KNZ Constr., Inc., 879 F. Supp. 451
(E.D. Pa. 1995) (W) (good language on need
for interim bargaining order)

Ahearn v. Beckley Mech., Inc., 161 LRRM 2311
(S.D. W.Va. 1999) (W) (8(a)(1) violations)

Moore-Duncan v. Aldworth Co., 124 F. Supp.2d 268
(D. N.J. 2000) (interim bargaining order runs against
joint employer)

Sharp v. Ashland Constr. Co., 190 F. Supp.2d 1164
(W.D. Wis. 2002) (W) (good language on
status quo and grants Board access to hiring records)

Kendellen v. Evergreen Ame. Corp., 2006 WL 1047473
(D. N.J. 2006) (W) (8(a)(1) violations, post-
lost election)

Barker v. Regal Health & Rehab Ctr.,
632 F. Supp. 2d 817 (N.D. Ill. 2009) (W)
(8(a)(3) discharges)

Muffley v. Dynamic Energy, Inc., 2011 WL 2604798 (S.D.W.Va. June 30, 2011) (L)

3. Subcontracting or Other Change to Avoid Bargaining Obligation

Circuit Court decisions:

Levine v. C & W Mining Co., 610 F.2d 432
(6th Cir. 1979) (L) (discriminatory subcontracting;
won *Gissel;* but lost on prohibition against sale of trucks [*****]

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Maram v. Universidad Interamericana, etc.,
722 F.2d 953 (1st Cir. 1983) (W) (8(a)(3)
subcontracting of janitorial department; statutory rights of
discriminates superior to job rights of replacements; good
language on passage of time)

Calatrello v. Automatic Sprinkler Corp. of Am.,
55 F.3d 208 (6th Cir. 1985) (L) (8(a)(3)
subcontracting; won reasonable cause, lost on j & p
based on expense of restoration of old operation)

Hirsch v. Dorsey Trailers, 147 F.3d 243 (3d Cir. 1998) (W)
(granted "mothball" order; good language on delay)

*Frankl v. HTH Corp.*650 F.3d 1334 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1821 (2012) (W)(employer used management company to bargain with union then removed management company when it came close to reaching a contract; employer then refused to "hire" bargaining committee members and withdrew recognition)[*]

District Court decisions:

Zipp v. Bohn Heat Transfer, 110 LRRM 3013
(C.D. Ill. 1982) (W) (work relocation;
with 8(a)(5) information)

Kobell v. Thorsen Tool Co., 112 LRRM 2397
(M.D. Pa. 1982) (W) (work relocation)

Eisenberg v. Suburban Transit, 112 LRRM 2708
(D. N.J. 1983) (W)
("single employer," work relocation)

Silverman v. Imperia Foods, 646 F. Supp. 393
(S.D.N.Y. 1986) (W) (8(a)(3)
accelerated plant relocation and mass discharge;
good language on need to restore lawful status quo)

D'Amico v. A.G. Boone, 647 F. Supp. 1546
(W.D. Va. 1986) (L), *supplemented*
in 660 F. Supp. 534 (W.D. Va. 1987) (W) (8(a)(3) work relocation;
lost first on interim restoration, but then won
Rule 60(b)(6) motion for "mothball" order)

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Kobell v. J.D. Hinkle & Sons, 131 LRRM 2321 (N.D. W. Va. 1988) (L) (restoration was too burdensome)

Frye v. Seminole Intermodal Transport, Inc. 141 LRRM 2265 (S.D. Ohio 1992) (W) (work relocation; good language on potential destruction of unit)

Miller v. LCF, Inc. (aka Sprint), 147 LRRM 2911 (N.D. Ca. 1994) (L) (work relocation; employer was losing money at old location)

Frye v. Kentucky May Coal, 148 LRRM 2945 (E.D. Ky. 1994) (L) (discriminatory subcontracting; unit employees were working for subcontractor at original location)

Bernstein v. Carter & Sons Freightways, Inc., 983 F. Supp. 994 (D. Kan. 1997) (W) (discriminatory subcontracting; restoration of operations not unduly burdensome; also grants Gissel remedy)

Aguayo v. Quadrtech Corp., 129 F. Supp.2d 1273 (C.D. Ca. 2000) (W) (discriminatory work relocation; also obtained TRO)

Dunbar v. Carrier Corp., 66 F. Supp.2d 346 (N.D.N.Y. 1999)(W) (unilateral work relocation)

Kreisberg v. Stamford Plaza Hotel & Conference Ctr., 849 F. Supp. 2d 279, 282 (D. Conn. 2012) (W) (subcontracting out ees' work to frustrate U activity)

Barker v. A.D. Conner, Inc., 807 F.Supp.2d 707 (N.D. Ill. 2011) (W) (soliciting ees to decertify U, threats to close facility, direct dealing, failure to engage in effects bargaining over closure, & using alter ego to avoid bargaining; good lang. re: irrep. harm; issuance of ALJD is not valid basis for denying 10(j) relief)

Gold v. Eng'g Contractors, Inc., 831 F.Supp.2d 856 (D. Md. 2011) (W) (ER created new corporate entity in order to avoid bargaining, withdrew recognition from U, term. all ees affiliated with the U, & only retained ees who discontinued U membership; good lang. re: irrep. harm).

4. Withdrawal of Recognition from Incumbent

Circuit Court decisions:

Brown v. Pacific Telephone, 218 F.2d 542 (9th Cir. 1954) (W) (8(a)(5) and 8(a)(2); "drifting away" of union members; C.J. Pope's concurring opinion)

Sachs v. Davis & Hemphill, 71 LRRM 2126 (4th Cir. 1969) (W) (classic "good-faith doubt" case; also read the district court opinion)

Pye v. Sullivan Brothers Printers, Inc., 38 F.3d 58 (1st Cir. 1994) (L) (novel union merger)

Overstreet v. El Paso Disposal, 625 F.2d 844 (5th Cir. 2010) (W) (refusal to reinstate ULP strikers, withdrawal of recognition) [*]

Glasser v. ADT Security Servs., 379 Fed.Appx. 483 (6th Cir. 2010), *rev'g and remanding* 2009 WL 1383291 (W. D. Mich. 2009) (withdrawal of recognition after "merger" of units; dist. ct denied injunction bc it found Board had not est. r/c, notwithstanding favorable ALJD; CA6 reverses finding of no r/c and remands for determination of whether j/p).

Lineback v. Irving Ready-Mix, Inc., 653 F.3d 566 (7th Cir. 2011), *aff'g* 780 F.Supp.2d 747 (N.D. Ind 2011) (W) (ER withdrew recog. after CBA expired & offered ee's indiv. employment K's; rejects ER defense that it was permitted to withdraw recog. under 8(f); "a decline in U's mem, loss of ee benefits, & ongoing erosion of the ER-U relationship, are suff. to establish irrep. harm)

District Court decisions:

DeProspero v. House of the Good Samaritan, 474 F. Supp. 552 (N.D.N.Y. 1978) (W) (affiliation of incumbent union with another union)

Balicer v. Helrose Bindery, 82 LRRM 2891 (D. N.J. 1972) (W) (alter ego)

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Pascarell v. Gitano Group, 730 F. Supp. 616
(D. N.J. 1990) (W)
(relocated part of operation)

Ledford v. Mining Specialists, Inc., 865 F. Supp. 314
(S.D. W. Va. 1993) (L) (alter ego)

Hoffman v. Hartford Hosp., 149 LRRM 2248
(D. Conn.1995) (W) (hospital merger)

Hirsch v. Konig, 895 F. Supp. 688 (E.D. Pa. 1995)
(W) (good language on delay after ALJ hrg.)

Ahearn v. House of Good Samaritan,
884 F. Supp. 654 (N.D.N.Y.1995) (W)

D'Amico v. Townsend Culinary, Inc., 22 F. Supp.2d 480
(D. Md. 1998) (W) (bad faith bargaining
tainted later showing of employee disaffection from union)

Dunbar v. Park Assocs., Inc., 23 F. Supp.2d 212
(N.D.N.Y. 1998) (W) (tainted good faith doubt)

McDermott v. Scott, 162 LRRM 2224
(C.D. Ca. 1999) (W)

Overstreet v. Tucson Ready Mix, Inc., 11 F. Supp.2d 1139
(D. Ariz. 1998) (W) (tainted good faith doubt;
successor employer improperly delayed bargaining)

Moore-Duncan v. Horizon House Developmental Servs., 155 F. Supp.2d 390 (E.D. Pa. 2001) (W)
(very good just and proper language)[*]

Aguayo v. San Diego/Imperial Counties Chapter of the Am. Red Cross, 166 LRRM 2953 (S.D. Ca. 2000)
(L) (Regional Director did not prove likelihood of success on taint theory and court was reluctant to impose apparent minority union on unit)

Kinney v. Cook Cnty. Sch. Bus, 2000 WL 748121
(N.D. Ill. 2000) (W) (w/d of recognition during term of K where employer had no right to terminate agreement)

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Moore-Duncan v. Laneko Eng'g Co. , 174 LRRM 2395
(E.D. Pa. 2003) (W) (distinguished Third Circuit's "small and intimate" unit doctrine)

Glasser v. Heartland Health Care Ctr. d/b/a Plymouth Court,
333 F. Supp.2d 607 (E.D. Mich. 2003)
(W) (w/d of recognition during term of agreement)

Pye v. Y.W.C.A. of W. Mass., 419 F. Supp.2d 20
(D. Mass. 2006) (W) (w/d of recognition during term
of orally agreed-upon contract)

Pye v. EAD Motors E. Air Devices, Inc., 175 LRRM 2441
(D. N.H. 2004) (W) (has 8(a)(2) committee)

Reichard v. Foster Poultry Farms, 425 F. Supp.2d 1090
(E.D. Ca. 2006) (W) (union affiliation)

Gold v. State Plaza, 481 F. Supp. 2d 43 (D. D.C. 2006)
(W) (employer solicited anti-union petition)

McDermott v. Peyton Cramer, Inc. d/b/a Power Ford of Torrance,
180 LRRM 3036 (C.D. Ca. 2006) (L) (court found minimum
likelihood of success that ER's w/d was based on tainted
decert petition; balance of harms roughly equal)
vacated as moot, 2007 WL 1839332 (C.D. Ca. 2007)

Calatrello v. Carriage Inn of Cadiz,
180 LRRM 3236 (S.D. Ohio 2006) (W) (w/d of recognition
under *Levitz*; 89-ee unit)

Kendellen v. Interstate Waste Servs. of N.J.,
181 LRRM 2603 (D. N.J. 2007) (L) (court found injunction not just and proper; change of status quo occurred before obligation to bargain over ee transfers) [case settled before appeal]

Norelli v. SFO Good-Nite Inn, 181 LRRM 2559
(N.D. Ca. 2007) (W) (w/d of recognition during contract term
and based on tainted petition; discharge of 2 in 22-ee unit)
182 LRRM 2648, (L) (refusal to extend affirmative bargaining order beyond 6 months)

Muffley v. APL Logistics, 183 LRRM 2964
(W.D. Ky. 2008) (W) (w/d of recognition under *Levitz*;
dueling employee petitions)

Timmins v. Narricot Indus., LP,
567 F. Supp. 2d 835 (E.D. Va. 2008), *vacated as moot* (L)
(tainted petition; injunction would not be just and proper)

Glasser v. Heartland Health Care Ctr.,
632 F. Supp. 2d 659 (E.D. Mich. 2009) (W) (tainted petition; injunction limited to 4 months)

Norelli v. Fremont-Rideout Health Group,
632 F. Supp. 2d 993 (E. D. Ca. 2009) (W)
(w/d of recognition under Levitz)

Garcia v. Sacramento Coca-Cola Bottling Co., 733 F.Supp.2d 1201 (E.D. Cal. 2010)(W)(withdrawal of recognition after union merger)

Mattina v. Ardsley Bus Corp., 711 F.Supp.2d 314 (S.D.N.Y. 2010)(W) (tainted withdrawal of recognition)

Hubbel v. Patrish, LLC, 903 F.Supp.2d 813 (E.D. Mo. 2012) (W) (ref. to barg. for successor K, unil. disch. of all unit ees, unil. subcontracting of all unit work, & unlawful withdrawal of recog.; good lang. re: irrep. harm, delay, & scattering; ER arg. that it cannot afford backpay weighs in favor of 10(j) bc interim reinstatement stops back pay accrual))

5. Undermining of Bargaining Representative [see also Category 8]

Circuit Court decisions:

Morio v. N. Am. Soccer League, 632 F.2d 217 (2dCir. 1980) (W) (individual employment contracts; court can grant remedies typically granted by Board; also read district court opinion)

Eisenberg v. Wellington Hall Nursing Home, 651 F.2d 902 (3d Cir. 1981) (W) (discharged employees on union bargaining committee; employer retains right to discipline for cause)

Squillacote v. Advertisers Mfg., 677 F.2d 544 (7th Cir. 1982) (W) (c & d order against unilateral changes during "test of certification" 8(a)(5) litigation)

Sheeran v. Am. Commercial Lines, 683 F.2d 970 (6th Cir. 1982) (W) (unilateral rescission of union hiring hall and union access to vessels; rejects *Collyer-Dubo* defense)

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Gottfried v. Frankel, 818 F.2d 485 (6th Cir1987) (W) (harass key union officials; summons and complaint not necessary for 10(j) petition; employer not entitled to full evidentiary hearing on reasonable cause issues; good language on delay)[*]

Fleischut v. Nixon Detroit Diesel, 859 F.2d 26 (6th Cir. 1988) (W) (immanency of ALJ hearing not relevant to just and proper inquiry)

Pascarell v. Vibra Screw, 904 F.2d 874 (3d Cir. 1990) (W) (discharge of employees on bargaining committee; good language on "chill" and delay)[**]

Arlook v. S. Lichtenberg, 952 F.2d 367 (11 th Cir. 1992) (W) (harass union stewards and probationary employees; unilateral changes; newly certified union is vulnerable; good language on passage of time)[*]

Schaub v. Detroit Newspaper Agency, 154 F.3d 276 (6th Cir. 1998) (L) (insufficient adverse impact on union's employee support and parties' negotiations)

Lineback v. Spurlino Materials, LLC, 546 F.3d 491 (7th Cir. 2008) (W) (unilateral implementation of new classification and selection criteria during 1st contract bargaining; discriminated against union leaders)

Ahearn v. Jackson Hosp. Corp., 351 F.3d 226 (6th Cir. 2003) (W) (discharge of former strikers employees where union is newly certified)

Harrell v. Am. Red Cross, 714 F.3d 553 (7th Cir. 2013), *aff'g in part & rev'g in part* 2011 WL 5436264 (C.D. Ill. Nov. 9, 2011) (dist. ct's order granting 10(j) relief for only 1 unil. change while denying relief for other unil. changes was an abuse of discretion - "limited injunction failed to fully address the harms that it recognized"; ALJ's finding of violation supports r/c finding; can infer irrep. harm from the nature of the violation; good lang. re: harm from unil. changes). [*]

Frankl v. HTH Corp., 693 F.3d 1051 (9th Cir. 2012) (Frankl II) (W) (consolidated case with enforcement of NLRB order and the second injunction action against HTH; COA affirms dist ct injunction against HTH for unil. changes, an 8(a)(3) discharge, denial of info. requests; conflicting evid. does not preclude r/c finding; disch of active & open U supporters "sends a message that the ER will take action against U

supporters"; 8(a)(5) violations, including unil. changes & refusal to provide info. "has long been understood as likely causing an irreparable injury to U representation"), *aff'g* 825 F.Supp.2d 101 (D. Haw. 2012) (W) [*]

District Court decisions:

Overstreet v. Western Professional Hockey League, 656 F. Supp. 2d 1114 (D. Ariz. 2009) (L) (minimal likelihood of success established regarding employer's bad-faith bargaining; no irreparable harm as parties reached agreement on some issues)

Overstreet v. Thomas Davis Med. Ctrs., 9 F. Supp.2d 1162 (D. Ariz. 1997) (W) (post-election unilateral changes; interim bargaining order only requires respondent to meet and bargain in good faith)

Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246 (S.D.N.Y. 1995) (W) (unilateral changes in sport's free agency; need to restore bargaining equality)

LeBus v. Manning, Maxwell & Moore, 218 F. Supp. 702 (W.D. La. 1963) (W) (test of certification; stresses prevention of industrial unrest)

Kinney v. Chicago Tribune, 132 LRRM 2795 (N.D. Ill. 1989) (L) (pay unnecessary wages to recalled strikers)

Ahearn v. Dunkirk Ice Cream, 133 LRRM 2088 (W.D.N.Y. 1989) (W) (abrogate grievance/ arbitration provisions)

Reynolds v. Curley Printing, 247 F. Supp. 317 (M.D. Tenn. 1965) (W) (post-certification 8(a)(3) subcontracting and surface bargaining)

Pascarell v. Orit Corp., 705 F. Supp. 200 (D. N.J. 1988) (W) (refusal to properly recall ULP strikers)

Bordone v. Talsol Corp., 799 F. Supp. 796 (S.D. Ohio 1992) (W) (discriminatory changes in t & c after certification)

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Kobell v. Beverly Health & Rehab. Servs.
987 F. Supp. 409 (W.D. Pa.1997) (W) (interim reinstatement of ULP strikers granted)

Dunbar v. Colony Liquor Distribs., 158 LRRM 3124 (N.D.N.Y. 1998) (W) (lawful plant relocation, but unlawful "effects" bargaining; refusal to consider employee transfers)

Aguayo v. South C. Refuse Corp., 161 LRRM 2867 (C.D. Ca. 1999) (W) (refusal to recall ULP strikers and to comply with terms of agreed-upon labor agreement)

Lineback v. Printpack, Inc., 979 F. Supp. 831 (S.D. Ind. 1997) (W) (interim reinstatement of union president during contract negotiations)

Calatrello v. NSA, a Div. of Southwire Co.,
164 LRRM 2500 (W.D. Ky. 2000) (W)
(bad faith bargaining and refusal to recall ULP strikers; good language for need to protect newly certified union)

Clements v. Alan Ritchey, 165 F. Supp. 2d 1068 (N. D. Ca. 2001) (L) (unilateral changes, direct dealing, and unlawful discharges; court found insufficient evidence that employer knew of union activity or made unilateral changes after union election)

Mattina v. Chinatown Carting Corp., 290 F. Supp.2d 386 (S.D.N.Y. 2003) (W) (discharge of employees and refusal to comply with area contract)

Barker v. Indus. Hard Chrome Ltd.,
181 LRRM 2313 (N.D. Ill. 2007) (L) (mass discharge of 20 strikers out of 90-ee unit during 1st contract bargaining)
182 LRRM 2091 (7th Cir. 2007) (W) (injunction pending appeal)

Chester v. Eichorn Motors,
504 F. Supp.2d 621 (D. Minn. 2007) (W) (discharged 3 ees in 4-ee unit; unilateral changes; direct dealing; extensive 8(1)s; court refused to order interim rescission of unilateral changes)

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Mattina v. Kingsbridge HeightsCare Center, 2008 WL 3833949 (S.D.N.Y. 2008), affd. 329 Fed.Appx. 319 (2d Cir. 2009) (W) (unilateral changes to health benefits, causing ULP strike; ER ordered to restore benefits and reinstate strikers upon unconditional offer to return)

Pye v. Longy School of Music, 759 F.Supp.2d 153 (D. Mass. 2011)(W/L) (lost bargaining order over broad decision to restructure faculty in recently-certified unit, but won bargaining over "effects" such as how to restructure)

Blyer v. One-Stop Kosher Supermarket, Inc. 720 F.Supp.2d 22 (E.D. N.Y. 2010) (W) (refusal to recognize union after entering into voluntary recognition agreement)

Lund v. Case Farms Processing, Inc., 794 F.Supp.2d 809, (N.D. Ohio 2011) (W) (discharge of two union supporters in large unit and numerous 8(a)(1)s to undermine recently certified bargaining representative)

Garcia NLRB v. Fallbrook Hosp., ---F.Supp.2d---, 2013 WL 3368979 (S.D. Cal., June 7, 2013) (W) (overall bf bargain., cond. barg., insistence to impasse on permiss. sub./refusal to bargain over mand. subj., ref. to bargain over effects of discharge of 2 ees, and ref. to provide info.; denies ER defense of deferral to 301 lawsuit)

Garcia v. S&F Market Healthcare, 2012 WL 1322888 (C.D. Cal., Apr. 17, 2012) (W) (overall bf bargaining; good lang. re: demon. irrep. harm in 8(a)(5) case "not a heavy burden"; good lang re: delay /5-month delay after complaint "commendable" bc it gave ct a developed record)

McDermott v. Veritas Health Servs., Inc., 2011 WL 2693922 (C.D. Cal., May 9, 2011) (L) (tech. 8(a)(5) case w/ unil. changes, 8(a)(3) disch., & misc. 8(a)(1)'s; 10(j) not j/p bc passage of time & lack of evid. to show that add'l harm will occur before Bd. order), *aff'd mem.*, 469 Fed.Appx.544 (9th Cir. 2012) (dist. ct. did not abuse its discretion).

Ahearn v. Remington Lodging & Hospitality, 842 F.Supp.2d 1186 (D. Alaska 2012) (W) (unil. changes, 8(a)(3) dischs., maintaining & enforcing unlawful handbook rules, premature decl. of impasse, withdrawal of recog., & failing to provide info.; good lang re: defer. To ALJ's cred. findings, delay (dist. *Ampersand*, explains that delay may be more permissible in 8(a)(5) cases than in 8(a)(3) reinstatement cases, & explains that delay for ALJ decision provides ct w/ benefit of developed record; irrep. harm; notice reading ordered).

Gottschalk v. Piggly Wiggly Midwest, 861 F.Supp.2d 962 (E.D. Wis. 2012) (W) (unil. changed 19 ees from full-time to part-time/constructively disch. ees; good lang. re: harm from unil. changes).

6. Minority Union Recognition

Circuit Court decisions:

Eisenberg v. Hartz Mountain, 519 F.2d 138 (3d Cir. 1975) (L) (seemingly fair contract with assisted union; time limits on 10(j) decrees)[*****]

Kaynard v. Mego, 633 F.2d 1026 (2d Cir. 1980) (W) (accretion; a "tussle" among the parties; Board ordered to expedite final decision on merits)

Muffley v. Voith, 906 F.Supp.2d 667 (W.D.Ky. 2012) (L), appeal pending (as of 11/15/13) 6th Cir

District Court decisions:

Hirsch v. Trim Lean Meat, 479 F. Supp. 1351 (D. Del. 1979) (W) (includes *Gissel*)

Fuchs v. Jet Spray, 560 F. Supp. 1147 (D. Mass. 1983) (W) (good entrenching analysis re 8(a)(2) union)

Zipp v. Dubuque Packing, 112 LRRM 3139 (N.D. Ill. 1982) (W) (premature recognition)

Greene v. Senco, 282 F. Supp. 690 (D. Mass. 1968) (W) (Regional Director does not have to litigate entire ULP complaint)

Chavarry v. Innovative Commc'ns. Corp., 146 F. Supp.2d 747 (D. V.I. 2000) (W) (w/d of recognition from newly certified union and grant of recognition to minority union where no accretion)

Moran v. LaFarge N. Am., Inc., 286 F. Supp.2d 1002 (N.D. Ind. 2003) (W) (interim relief warranted where Region sought to unblock representation case filed by second union)

McDermott v. Dura Art Stone, 298 F. Supp.2d 905 (C.D. Ca. 2003) (W) (employer and incumbent union negotiated successor contract when parties knew that union had lost its majority)

Glasser v. Comau, Inc., 767 F.Supp.2d 778 (E.D. Mich. 2011)(L)

7. Successor Refusal to Recognize and Bargain

Circuit Court decisions:

Solien v. Merchants Home Delivery, 557 F.2d 622 (8th Cir. 1977) (L) (good language on delay)

Kobell v. Suburban Lines, 731 F.2d 1076 (3d Cir. 1984) (L) (*Kallman*; small and intimate unit exception; rejects *Crain* and *Mack* defense re job rights of replacements)

*Scott v. El Farra Enter*s., 863 F.2d 670 (9th Cir. 1988) (W) (*Kallman;* court must defer to Board's choice of remedy)

Asseo v. Centro Medico del Turabo, 900 F.2d 445 (1st Cir. 1990) (W) (failure to hire union steward; good language on public interest)
Frye v. Specialty Envelope, Inc., 10 F.3d 1221 (6th Cir. 1993) (W)

Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360 (2d Cir. 2001) (W) (substantial and representative complement issue)

Bloedorn v. Francisco Foods, Inc. d/b/a Piggly Wiggly, 276 F.3d 270 (7th Cir. 2001) (W) (*Kallman* successor; good language re loss of benefits of collective bargaining; winning ALJD supports Region's likelihood of success on merits)[*]

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Muffley v. Spartan Mining Co.,
570 F.3d 534 (4th Cir. 2009) (W/L) (*Kallman*)
(court adopted four-part equitable standard; upheld Board's delegation authority to GC under 3(d) and district court's interim reinstatement of discriminatees but denied cross-appeal for interim bargaining order; good language on delay)

Chester v. Grane Healthcare Co., 666 F.3d 87 (3d Cir. 2011) (W)
(successor refusal to bargain where ER was previously a public ER and transitioned to a private ER; upholds dist ct's bargaining order under successorship principles and remands issue of whether inj. Should be granted for 8(a)(3) failure-to-hire claim bc dist ct had applied *Winter*'s 4-part equitable test rather than j/p & r/c, and 3d Cir determines j/p and r/c is still standard after *Winter*), *aff'g in part and remanding* 797 F.Supp.2d 543 (W.D. Pa. 2011). [*]

Small v. Avanti Health Sys., 661 F.3d 1180 (9th Cir. 2011) (W) (favorable ALJD can support likelihood of success element; quotes *Frankl v. HTH I* and has very good lang. re: immeasurable benefits of U rep. & irrep. harm from delay in barg., irrep. harm in successor refusal-to-bargain cases, delay, & min. harm to ER by requiring ER to barg. in good faith) [*]

District Court decisions:

Squillacote v. U.S. Marine, 116 LRRM 2663
(E.D. Wis. 1984) (W)

Mack v. Air Express, 471 F. Supp. 1119
(N.D. Ga. 1979) (L) (rights of replacements)

Asseo v. El Mundo Corp., 706 F. Supp. 116
(D. P.R. 6, 1989) (W) (*Kallman*)

Watson v. Moeller Rubber Prods.,
792 F. Supp. 1459 (N.D. Miss. 1992) (W)
(respondent took over one plant of multi-plant unit of predecessor)

Asseo v. Bultman Enters., 913 F. Supp. 89
(D. P.R. 1995) (W) (*Kallman*)

Donner v. NRNH, 163 LRRM 2033 (W.D.N.Y. 1999)
(W) (*Kallman*)

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Wells v. Brown & Root, Inc., 65 F.Supp.2d 1264 (S.D. Ala. 1999) (L) (*Kallman*; weak 8(a)(3) hiring scheme)

Dunbar v. Onyx Precision Servs., 129 F. Supp.2d 230 (W.D.N.Y. 2000) (W) (8(a)(2) union involved)

Glasser v. Precision-Gage-Dearborn, LLC, 2003 WL 22140116 (E.D. Mich. 2003) (W) (substantial and representative complement; burden on employer to show employee disaffection from union)

Small v. Marine Spill Response Corp., 2006 WL 1429445 (C.D. Ca. 2006) (W) (court gave deference to Region's unit determination)

Chester v. CMPJ Enterprises, 2007 WL 1994045 (D. Minn. 2007) (W) (*Kallman*)

Hoffman v. The Parksite Group, 596 F.Supp.2d 416 (D. Conn. 2009) (W) (*Kallman*; substantial and representative complement)

Muffley v. Adv. Metal Techs. of Indiana, 2013 WL 593890 (S.D. Ind., Feb. 15, 2013) (W/L) (successor refusal to hire 2 ees & surface barg.; finds no r/c on refusal-to-hire claim, but grants 10(j) relief on surface barg.)

Kreisberg v. Pressroom Cleaners, 2012 WL 6197405 (D. Conn., Dec. 12, 2012) (W) (successor refusal-to-hire U ees from predecessor & various 8(a)(1) statements made to new ee's; good lang. on ees scattering despite current desire to return to work).

Paulsen v. GVS Props., 904 F.Supp.2d 282 (E.D.N.Y 2012) (L) (no r/c to find that ER was *Burns* successor where NY law required ER not to displace predecessor's ees for at least 90 days; *Burns* requires that hiring of predecessor's ees is voluntary)

Calatrello v. JAG Healthcare, 2012 WL 4919808 (N.D. Ohio, Oct. 16, 2012) (W) (*Kallman*, unil. changes, dischs. of 3 U supporters, & unlawful no-solicitation rule; notice reading ordered)

Ohr v. Nexeo Solutions, LLC, 871 F.Supp.2d 794 (N.D. Ill. 2012) (L) (no r/c to find that ER is "perfectly clear" successor, where asset purchase agrmt. provided only that successor would recog. the units & stated it was not adopting or assuming CBA's, & successor wrote letters to ees stating that it was changing their t/cs of employment).

8. Conduct During Bargaining Negotiations [see also Category 5]

Circuit Court decisions

Douds v. ILA, 241 F.2d 278 (2d Cir. 1957) (W) (union insisted upon change in historic unit; also read district court decision)

McLeod v. General Electric, 366 F.2d 847 (2d Cir. 1966) (L) (employer refusal to meet with union's bargaining committee; order improperly changed status quo)

MMM v. Meter, 385 F.2d 265 (8th Cir. 1967) (L) (union bargaining committee; 10(j) order improperly changed status quo)

Rivera-Vega v. ConAgra, Inc., 70 F.3d 153 (1st Cir., *aff'g*. 876 F. Supp. 1350 (D. P.R. 1995), *stay denied* 879 F. Supp. 165 (W) (denial of financial information; bad faith bargaining; unilateral changes; employer lockout)[*****]

Kobell v. United Paperworkers Int'l Union, AFL-CIO, 965 F.2d 140l (6th Cir. 1992) (W) (8(b)(3) pooling of union's contract ratification votes)

Harrell v. Am. Red Cross, 714 F.3d 553 (7th Cir. 2013), *aff'g in part & rev'g in part* 2011 WL 5436264 (C.D. Ill. Nov. 9, 2011) (unil. changes; good lang. re: infer. irrep. harm from the nature of the violation; unil. changes "prevent the U from discussing terms" & and "'strike at the heart of the U's ability to effectively represent the unit of employees.'")

Frankl v. HTH Corp,.650 F.3d 1334 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1821 (2012) (deems Bd's auth. as significant & is "hospitable" to GC's view of the law, even when novel, bc of GC's expertise in labor policy; "irrep. injury is established if a likely ULP is shown along w/ a present or impending deleterious effect of the likely ULP that would likely not be cured by later relief.. . . inferences from the nature of the part. ULP at issue remain available") [*]

Kreisberg v. HealthBridge Mgmt LLC, 732 F.3d 131 (2d Cir. October 15, 2013) (W) (unlawful implementation of last offer in absence of valid impasse and where many prior unremedied ULPs; ER ordered to restore T&C and reinstate 600+ ULP strikers)

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District Court decisions:

Boire v. SAS Ambulance, 108 LRRM 2388 (M.D. Fl. 1980) (W) (refusal to bargain with 8(a)(3)s on union committee)

Little v. Portage Realty, 73 LRRM 2971 (N.D. Ind. 1970) (W) (bad faith bargaining)

Johansen v. Operating Engineers, 99 LRRM 2852 (C.D. Ca. 1978) (W) (permissive bargaining subject)

Squillacote v. Generac, 304 F. Supp. 435 (E.D. Wis. 1969) (W) (denial of relevant information)

Penello v. U.M.W., 88 F. Supp. 935 (D. D.C. 1950) (W) (remove union's permissive subjects which were stumbling block to parties' negotiations)

Hirsch v. Tube Methods, 125 LRRM 2198 (E.D. Pa. 1986) (W) (classic bad faith bargaining)[*]

Silverman v. Reinauer Transp. Cos., 130 LRRM 2505 (S.D.N.Y. 1988) (W) (employer insisted upon change in historic unit; order required removal of subject from bargaining and required recall of ULP strikers)

Frye v. Pony Express Courier, 148 LRRM 2042 (S.D. Ohio 1994) (L) (refusal to meet at reasonable times)

Kobell v. United Refining Co., 159 LRRM 2762 (W.D. Pa. 1998) (W) (unilateral changes after union's certification, with animus motive)

Fleischut v. Burrows Paper Corp., 162 LRRM 2719 (S.D. Miss. 1999) (W) (bad faith bargaining)

Friend v. District Council of Painters No. 8, 157 LRRM 2753 (N.D. Ca. 1997) (W) (multi-employer unit)

Blyer v. Pratt Towers, Inc., 124 F. Supp.2d 136 (E.D.N.Y. 2000) (W) (bad faith bargaining and discharge of striking employees)

Garcia v. Fallbrook Hosp., ---F.Supp.2d---, 2013 WL 3368979 (S.D. Cal., June 7, 2013) (W) (overall bad faith bargain/ conditional bargaining, refusal to provide info.)

Paulsen v. Renaissance Equity Holdings, 849 F.Supp.2d 335 (E.D.N.Y. 2012) (W/L) (surface barg., ref. to provide info., conditioning lockout on permiss. subject of barg., replacing ULP strikers, & unilateral subcontracting of unit work; excellent lang. re: irrep. harm from loss of health care benefits; dist. ct. orders BO & reinstatement of strikers, but refuses to reinstate to wage level contained in expired CBA)

Paulsen v. All American School Bus Corp.. __ F.Supp.2d __, 2013 WL 4780043 (E.D.N.Y. August 28, 2013), stay denied 2013 WL 574483 (E.D.N.Y. October 23, 2013), appeal pending 2d Cir (still as of 11/15/13) (implementation of last offer for 8000 employees in absence of good faith impasse)

9. Mass Picketing and Violence

Squillacote v. Food Workers, 534 F.2d 735 (7th Cir. 1976) (W) (union agency; TRO and Rule 65; civil contempt)[*****]

Frye v. Dist. 1199, 996 F.2d 141 (6th Cir. 1993) (W) (good language on irreparable harm; scope of just and proper relief)

Ahearn v. ILWU, Locals 21 and 4, ---F.3d ---, 2013 WL 3357924 (9th Cir., July 5, 2013) (contempt of 10j order against picketline misconduct) (W, but L on nonparty damages) (§303 lawsuit was not secondary ER's sole remedy for damages; evidence supported civil contempt damages award to CP; comp. damages award to nonparties (police & RR) was abuse of discretion)

Grupp v. Steelworkers, 532 F. Supp. 102 (W.D. Pa. 1982) (W) (joint venture)

Compton v. Puerto Rico Newspaper Guild, 343 F. Supp. 884 (D. P.R. 1972) (W)

Squillacote v. Auto Workers, 384 F. Supp. 1171
(E.D. Wis.1974) (L) (unremedied 8(a)(5) complaint)

Squillacote v. Food Workers, 390 F. Supp. 1180
(E.D. Wis. 1975) (W) (state suit not bar)

Vincent v. UE, 73 LRRM 2139
(S.D.N.Y. 1969) (W) (blocking ingress)

Clark v. UMWA, 722 F. Supp. 250
(W.D. Va. 1989) (L) (state court decree was effective)

Clark v. UMWA, 714 F. Supp. 791
(W.D. Va. 1989) (W) (state court decree was not effective)

Bloedorn v. Teamsters Local 695, 132 LRRM 3102
(W.D. Wis. 1989) (W) (affidavit of compliance)

Kollar v. United Steelworkers of Am., 161 LRRM 2307
(N.D. Ohio 1999) (W) (decree directs U.S.
Marshals to take "all actions" to enforce provisions and
prohibitions of order)

10. Notice Requirements for Strike or Picketing (8(d) & 8(g))

McLeod v. Sewer Workers, 292 F.2d 338
(C.A.N.Y. 1968) (W)

Glasser v. Douglas Autotech Corp., 781 F.Supp.2d 546 (W.D. Mich. 2011) (L) (employer later locked out and then discharged strikers where union had failed to give timely 8(d) notice before striking, so that the strike was unprotected)*

McLeod v. CWA, 79 LRRM 2532
(S.D.N.Y. 1971) (W)

Curry v. Trabajadores, 86 F. Supp. 707
(D. P.R. 1949) (W)

Schneid v. UMW, 40 LRRM 2529
(N.D. Ill. 1957) (W)

Blyer v. Local 1814, ILA, 724 F. Supp. 1092
(S.D.N.Y. 1989) (L)
("technical" violation)

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11. Refusal to Permit Protected Activity on Property

Eisenberg v. Holland Rantos, 583 F.2d 100
(3d Cir. 1978) (W) (industrial park)

Silverman v. 40-41 Realty Assocs.,
668 F.2d 678 (2d Cir. 1982) (L)
(office building)

Baudler v. Am. Baptist Homes of the West, 798 F.Supp.2d 1099 (N.D. Cal. 2011) (W) (discriminatory enforcement of no-access rule against U supporters during strike vote)

Calatrello v. Rite Aid of Ohio, 823 F.Supp.2d 690 (N.D. Ohio 2011) (W) (enjoining filing and maintenance of lawsuits that interfered w/ ees' ability to picket and handbill)

12. Union Coercion to Achieve Unlawful Object (including some 10(l) decisions)

Boire v. IBT, 479 F.2d 778
(5th Cir. 1973) (W) (expansion of unit;
substantial and not frivolous legal theory)[*****]

D'Amico v. Shipbuilding Workers, 116 LRRM 2508
(D. Md. 1984) (W) (internal union discipline)

Compton v. Carpenters, 220 F. Supp. 280
(D. P.R. 1963) (W)

Evans v. I.T.U., 76 F. Supp. 881
(S.D. Ind. 1948) (W)

Brown v. NMU, 104 F. Supp. 685
(N.D. Cal. 1951) (W) (hiring hall)

Madden v. UMW, 79 F. Supp. 616
(D. D.C. 1948) (W)

Elliott v. Sheet Metal Workers, 42 LRRM 2100
(D. N.M.) (W) (multiemployer bargaining)

Jaffee v. Newspaper and Mail Deliverers,
97 F. Supp. 443 (S.D.N.Y. 1951) (W)

Kohn v. Southwest Reg'l Council of Carpenters, 289 F. Supp. 2d 1155 (C.D. Ca. 2003) (L) (bannering was not equivalent to secondary picketing)

Overstreet v. Carpenters, Local 1506, 409 F.3d 1199 (9th Cir. 2005) (L)(bannering)

Kentov v. Sheet Metal Workers, 418 F.3d 1259 (11th Cir. 2005) (W) (union's mock funeral process was equivalent to secondary picketing)

Gold v. Mid-Atlantic Regional Council of Carpenters, 407 F. Supp. 2d 719 (D. Md. 2005) (L) (bannering)

Moore-Duncan v. Sheet Metal Workers (E.P. Donnelly), 624 F. Supp. 2d 367 (D. N.J. 2008) (L) (no reasonable cause established that union's enforcement of arbitral award challenging Board's prior 10 (k) decision was unlawful; injunction would not be just and proper)

13. Interference with Access to Board Processes

Sharp v. Webco Indus., 265 F.3d 1085 (10th Cir. 2001) (W) (lawsuit)

*Szabo v. P*I*E Nationwide*, 878 F.2d 207 (7th Cir. 1989) (L) (no chill)

Humphrey v. United Credit Bureau, 99 LRRM 3459 (D. Md. 1978) (W) (lawsuit)

Wilson v. Whitehall Packing, 108 LRRM 2165 (W.D. Wis. 1980) (W) (lawsuit)

Hirsch v. Pilgrim Life Ins. Co., 112 LRRM 3147 (E.D. Pa. 1982) (W) (lawsuit)
Zipp v. Caterpillar, Inc., 858 F. Supp. 794 (C.D. Ill. 1994) (L) (insufficient evidence of chill)

14. Segregating Assets

NLRB v. Burnette Castings, 25 LRRM 2095 (6th Cir. 1949) (W) (Section 10(e); bond alternative)

NLRB v. Interstate Equip., 74 LRRM 2003 (7th Cir. 1970) (W) (Section 10(e))

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NLRB v. A.N. Elec. Corp., 141 LRRM 2386 (2d Cir. 1992) (W) (Section 10(e))

NLRB v. Horizon Hotel Corp., 159 LRRM 2449 (1st Cir. 1998) (W) (Section 10(e))

NLRB v. Rosedale Fabricators, L.L.C., 175 LRRM 2297 (5th Cir. 2004) (W)(10(e) and All Writs Act)

Jensen v. Chamtech Serv. Ctr., 155 LRRM 2058 (C.D. Ca. 1997) (W) (10j petition based upon backpay specification)

Aguayo v. Chamtech Serv. Ctr., 157 LRRM 2299 (C.D. Ca. 1997) (W) (ex parte TRO protective order granted under 10j and All Writs Act)

Maram v. Alle Arecibo, 110 LRRM 2495 (D. P.R. 1982) (W) (disappearing equipment)

Norton v. New Hope Indus., 119 LRRM 3086 (M.D. La. 1985) (W)(individual's personal assets; duty to provide information)

Kobell v. Menard Fiberglass, 678 F. Supp. 1155 (W.D. Pa. 1988) (W) (includes reinstatement and preferential hiring list)

Schaub v. Brewery Prods., 715 F. Supp. 829 (E.D. Mich. 1989) (W) (need only estimate amount of backpay)

Fuchs v. Workroom For Designers, 116 LRRM 2324 (D. Mass. 1984) (W) (appointment of special master with receivership powers)

Model Argument for "Protective Order" or Sequestration of Assets Injunctions Under Section 10(j) (Section 10(j) Manual)[*****]

15. Miscellaneous

Eisenberg v. Lenape Prods., 781 F.2d 999 (3d Cir. 1986) (L) (*Washington Aluminum* discharges) (read C.J. Becker's dissent); *see also* discussion in *Vibra Screw*, 904 F.2d 874 (3d Cir.)

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Luster Coate Metallizing, Inc., Case 3-CA-19735
G.C. 10(j) Memorandum dated March 22, 1996
(*Washington Aluminum* discharges)

Ryder Student Transp. Serv., Inc.,
Cases 1-CA-35799, GC 10(j) Memorandum dated
February 3, 1998 (mutual aid or protection activities;
discharge of strikers protesting discharge of another employee)

Lineback v. Printpack, Inc., 979 F. Supp. 831
(S.D. Ind. 1997) (W)
(enjoin prosecution of alleged baseless
and retaliatory Section 303 LMRA suit)

Sharp v. Webco Indus., 265 F.3d 1085
(10th Cir. 2001) (W) (enjoin prosecution of
preempted lawsuit)

Baudler v. Am. Baptist Homes of the W., 798 F.Supp.2d 1099 (N.D. Cal. 2011) (W) (*Hot Shoppes* failure to reinstate economic strikers where ER motivated by indep. unlawful purpose; good lang. re: conflict in evid. does not preclude RD from est. r/c)

II. OTHER SECTION 10(j)-RELATED CASES

Kinney v. Fed. Sec., Inc., 272 F.3d 924
(7th Cir. 2001) (Board's resolution of unfair labor
practice case moots a 10(j) appeal)

McLeod v. Gen. Elec. Co., 257 F. Supp. 690
(S.D.N.Y. 1966) (reversed on other grounds C.A. 2)
(district court precluded from examining conduct of
Regional Director's investigation of case)

Kessel Food Markets, Inc. v. NLRB, 868 F.2d 881
(6th Cir. 1989) (Board's authorization of 10(j) proceedings
does not prejudice Board's decision and order in administrative
case)

NLRB v. S.E. Nichols, Inc., 862 F.2d 952
(2d Cir. 1988) (result in 10(j) proceeding not
binding on Board in subsequent ULP case)

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Fusco v. Richard W. Kaase Baking Co.¸ 205 F. Supp. 459
(N.D. Ohio 1962) (W) (discovery)

U.S. v. Electro-Voice, Inc., 879 F. Supp. 919
(N.D. Ind. 1995) (W) (discovery)

D'Amico v. Cox Creek Refining Co., 126 F.R.D. 501
(D. Md. 1989) (W) (discovery)

Ahearn v. Rescare West Virginia, 208 F.R.D. 565
(S.D. W. Va. 2002) (W) (discovery)

Kobell v. Reid Plastics, Inc., 136 F.R.D. 575
(W.D. Pa. 1991) (W) (discovery)

Dunbar v. Landis Plastics, Inc., 977 F. Supp. 169
(N.D.N.Y. 1997) (W) (discovery)

Lineback v. Coupled Products, Inc., 2012 WL 1867615 (N.D. Ind. May 22, 2012)(L) (discovery)(motion to strike Rule 30(b)(6) deposition of Board agent denied); sanctions assessed against Board 2012 WL 2504909 (N.D. Inc. June 28, 2012)

Hirsch v. Corban Corp., 155 LRRM 2589
(E.D. Pa. 1997) (W) (EAJA)

D'Amico v. Marine and Shipbuilding Workers, 630 F. Supp. 919
(D. Md. 1986) (W) (EAJA)

Dunbar v. MSK Corp., 173 LRRM 3119 (2d Cir.), *aff'g*
171 LRRM 2494 (W.D.N.Y. 2003) (L) (EAJA)

Szabo v. U.S. Marine Corp., 819 F.2d 714
(7th Cir. 1987) (W) (civil contempt; direct dealing;
general Board bargaining order covers all 8(a)(5) violations)

Evans v. I.T.U., 81 F. Supp. 674
(S.D. Ind.) (W)(civil contempt)

Humphrey v. Southside Elec. Cooperative, Inc., 104 LRRM 2589
(E.D. Va. 1979) (W) (civil contempt)

Clark v. Int'l Union, UMWA, 752 F. Supp. 1291
(W. D. Va. 1990) (W) (civil contempt; assessed fines not
moot after settlement of dispute)

Aguayo v. S. Coast Refuse Corp., 2000 WL 1280915 (C.D. Ca. 2000) (W) (civil contempt)

Asseo v. Bultman Enters., 951 F. Supp. 307 (D. P.R. 1996) (W) (civil contempt; name corporate officer as joint contemnor)

U.S. v. Hochschild, 977 F.2d 208 (6th Cir. 1992) (W) (criminal contempt)

Centra v. Hirsch, 606 F. Supp. 530 (E.D. Pa. 1995) (W) (unsuccessful respondent attempt to enjoin Board prosecution of 10(j) proceeding)

Mattina v. Saigon Grill Gourmet Rest.,, 2009 WL 323507 (S.D.N.Y. 2009) (W) (civil contempt)

Silverman v. JRL Food Corp., 196 F.3d 334 (2d Cir. 1999) (W) (district court must give deference to findings of ALJD)

Fuchs v. Hood Indus., 590 F.2d 395 (1st Cir. 1979) (W) (district court may not hold 10(j) proceeding in abeyance to wait for decision of ALJ)

Innovative Comm'n Corp., 333 NLRB 665 (2001) (W) (Board will not consider evidence adduced before district court in 10(j) case which was not formally made a part of the administrative record)

NLRB v. Jackson Hosp., 786 F.Supp.2d 123, 128 (D.D.C. 2011) (W) (in proceeding involving contempt of Bd. order, judge concludes that decision of dist. ct. judge in 10(j) proceeding is not *res judicata* on the Bd in admin. hearings or actions to enforce a Bd. order).

III. LAW REVIEW ARTICLES (for background; not updated)

1. Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," 96 Harv. L. Rev. 1769, 1787-1803 (1983)

2. Paul Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 Harv. L. Rev. 351, 354-57 (1984)

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3. Catherine Hodgman Helm, "The Practicality of Increasing the Use of NLRA Section 10(j) Injunctions," 7 Ind. Rel. L. J. 599, 603-607 (1985)

4. Randal L. Gainer, "The Case For Quick Relief: Use of Section 10(j) of the Labor Management Relations Act in Discriminatory Discharge Cases," 56 Ind. L. J. 515, 517 n. 13 (1981)

5. Warren H. Chaney, "The Reinstatement Remedy Revisited," 32 Lab. L. J. 357, 363 (1981)

6. Note, "The Propriety of Section 10(j) Bargaining Orders in Gissel Situations," 82 Mich. L. Rev. 112 (1983)

7. Clifford M. Koen, Jr., et al., "10(j) Injunctions: A Shift in NLRB Approach," November 1995 Labor Law Journal 699 (notes Board's increasing use of 10(j) in mid-1990's)

8. Terry A. Bethel, et al., "The Failure of Gissel Bargaining Orders," 14 Hofstra Lab. L. J. 423 (1997)(notes failure of Board Gissel bargaining orders, and discusses use of 10(j) proceedings)

9. Richard Lapp, "A Call for a Simpler Approach: Examining the NLRA's Section 10(j) Standard," 3 U. Pa. J. Lab. & Empl. 251 (2001)(recommends use of traditional equitable criteria rather than old two-part test of "reasonable cause" and "just and proper")

10. Mary Ann Leuthner, "Need for a Ceasefire in the War on the Workers: Restoring the Balance and Hope of the National Labor Relations Act," 37 J. Marshall L. Rev. 925, 950-52 (2004)

APPENDIX F

DISTRICT COURT MEMORANDA OF POINTS & AUTHORITIES AND APPELLATE COURT BRIEFS BY SECTION 10(j) CATEGORY[1]

Copies of 10(j) district court memoranda of points and authorities and appellate court briefs may be obtained by contacting the Injunction Litigation Branch. Most of the appellate court briefs are also available in electronic form from the ILB database on the NLRB Intranet.

1. Interference with Organizational Campaign (no majority)

Schaub v. West Michigan Plumbing, 99-2369 (6th) (isolation and discharge of union supporter very early in organizing campaign)

Silverman v. JRL Food, 99-6189 (2d) (discharge of union supporter; deference to ALJD)

Pye v. Excel Case Ready, 00-1632 (1st) (discharge of union supporters)

Sharp v. Webco Industries, 99-5111 (10th) (pretextual layoff of majority of union organizing committee; defense of two-part standard)

Scott v. PHC-Elko, 99-16755 (9th) (8(a)(3) and (1) discharge)

McDermott v. St. Vincent Medical Center, 00-56572 (9th) (subcontract bargaining unit in response to union campaign)

Sharp v. Parents In Community Action, 98-1285 (8th) (8(a)(3) discharge of prominent Union organizer, 8(a)(1) campaign; defense of two-part standard)

2. Interference with Organizational Campaign (majority)

Yerger Trucking, Inc., 4-CA-19810 (3d) (alter Ego, *Gissel* bargaining order)

Dauman Recycling, Inc., 22-CA-18105 (3d)

Moore-Duncan v. Traction Wholesale, 98-1111 (3d) (8(a)(1) and (3) *Gissel* bargaining order sought after election loss; discharge of leading union organizer)

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[1] Cases referred to by Board charge number refer to district court memoranda of points and authorities; cases referred to by appellate court docket number refer to appellate briefs.

Scott v. Stephen Dunn & Associates, 00-15416 (9th) (*Gissel*; improved wages and working conditions, unit packing)

Bordone v. Electro-Voice, 95-2611 (7th)

Gottfried v. Special Waste Systems, 91-1147 (6th)

Garner v. Macclenny Products, 94-3185 (11th)

3. Subcontracting or Other Change to Avoid Bargaining Obligation

Santana Express, Inc., 25-CA-21776 (7th) (8(a)(3) subcontracting and *Gissel* bargaining order)

LCF, Inc., d/b/a Sprint Corp., 20-CA-26203 (9th Cir. 1994) (8(a)(3) work relocation and single employer)

Hartford Division, Emhart Glass, 34-CA-6704 (2d Cir. 1994) (8(a)(5) subcontracting; no union waiver; request for TRO)

Aguayo v. Quadrtech Corp., 21-CA-34084 (9th Cir. 2000) (8(a)(3) & (5) relocation)

Hirsch v. Dorsey Trailers, 97-7542 (3d) (8(a)(5) work relocation and plant closure; "mothball" order sought)

Sharp v. Oklahoma Fixtures, 92-5244 (10th) (8(a)(3) subcontracting)

Calatrello v. Automatic Sprinkler, 94-4213 (6th) (8(a)(3) subcontracting)

4. Withdrawal of Recognition from Incumbent

Kuhnle Brothers, Inc., 3-CA-19625 (2d Cir. 1996) (bad-faith bargaining, reassignment of unit work to outside of unit, withdrawal of recognition)

Bridgestone/Firestone, Inc., 32-CA-16135 (9th Cir. 1998) (tainted withdrawal of recognition)

Research Management Corp., 4-CA-18559 (3d Cir. 1990) (*Snow and Sons* refusal to be bound by card check; need for interim bargaining order to negotiate over effects of closing of facility)

Bloedorn v. Wire Products, 95-3656 (7th) (assisted decertification campaign, discrimination, withdrawal of recognition based upon tainted, minority petition)

Tremain v. Beverly Farm Foundation, 96-33531 (7th) (withdrawal of recognition after end of certification year)

Hoffman v. Hartford Hospital, 95-6065 (2d) (merger of hospitals)

Malone v. Beaird Industries, 92-4538 (5th) (tainted good-faith doubt)

5. Undermining of Bargaining Representative

S. Lichtenberg & Co., 10-CA-24782 (11th Cir. 1990) (8(a)(3) and (5) violations to undermine newly certified union)

Ahearn v. PCI, 00-5059 (6th) (failure to bargain in good faith and unilateral changes during Union's certification year)

Schaub v. Detroit Newspaper Agency, 97-1920 (6th) (refusal to recall unfair labor practice strikers during contract negotiations)

Fleischut v. Burrows Paper, 99-60745 (5th) (bad-faith bargaining and unitlateral changes during initial contract negotations; defense of two-part 10(j) standard)

Pascarell v. Consec Security, 97-5275 (3d) (wage restoration necessary for effective contract negotiations; defense of two-part 10(j) standard)

Kobell v. Beverly Health and Rehabilitation Services, 97-3200 & 97-3357 (3d) (coordinated 8(a)(1) campaign; defense of two-part standard; broad, multifacility cease-and-desist order sought)

Pascarell v. Vibra Screw, 89-5973 (3d) (discharge of members of union negotiateing committee)

Arlook v. Lichtenberg & Co., 91-8162 (11th) (refusal to meet and bargain, unilateral changes and 8(a)(3) conduct directed at union stewards and probationary employees)

6. Minority Union Recognition

(None available at time of printing; call Injunction for subsequent filings)

7. Successor Refusal to Recognize and Bargain

BTNH, Inc., 3-CA-19793 (2d Cir. 1996) (*Burns*; unit and 2(11) issues; unilateral changes; petition and memo of points)

Hoffman v. Inn Credible Caterers, 00-6235 (2d) (*Burns* successor; harm to public interest)

Cohen v. Samuel Bent, 00-2411 (1st) (*Burns* successor, *St. Elizabeth* theory; rejecting *Allentown Mack* defense)

Scott v. Catholic Healthcare West South Bay, 00-16338 (9th) (*Burns* successor; non-conforming health care unit)

Bloedorn v. Francisco Foods d/b/a Piggly Wiggly, 00-1860 (7th) (*Kallman*/*Love's BBQ* refusal to hire predecesor employees; interim rescission of unilateral changes)

Frye v. Specialty Envelope, 93-3339 (6th)

8. Conduct during Bargaining Negotiations

ConAgra, Inc., 24-CA-6856 (1st Cir. 1994) (refusal to bargain in good faith, with employer lockout of unit; petition, memo of points, Board opposition to employer motion for stay, in district court and circuit court)

Pascarell v. Control Services, 90-5451 (3d) (refusal to meet at reasonable times)

Rivera-Vega v. ConAgra, 95-1266 (1st) (lockout in support of bad-faith bargaining)

Silverman v. Reinauer Transportation, 89-6010 (2d) (insistence upon permissive change in scope of unit)

Kobell v. United Paperworkers, 91-6141 (6th) (8(b)(3) "pooled" contract ratification vote)

9. Mass Picketing and Violence

Frye v. District 1199, 92-6102 (6th) (scope of court's power to grant j&p relief)

Clark v. United Mine Workers, 90-2068, 91-2016 (4th) (union agency; civil contempt)

10. Notice Requirements for Strikes or Picketing Section 8(d) and (g)

(None available at time of printing; call Injunction Litigation Branch for subsequent filings)

APPENDIX F

11. Refusal to Permit Protected Activity on Property

Hirsch v. The Electrology Co., 89-1537 (3d) (organizing union's access to private property factory driveway)

12. Union Coercion to Achieve Unlawful Object

Sheet Metal Workers' Local Union No. 22, Case 22-CB-5953 (3d Cir. 1989) (unlawful union fine) (petition, memoranda of points and dist court op.)

13. Interference with Access to Board Processes

Sharp v. Webco Industries, 00-5005 (10th Cir. 2000) (preempted state suit against employee charge filing activity)

14. Segregating Assets

Opposition to Motion for Stay of Protective Order Pending Appeal, *Fleischut v. Memphis Dinettes*, 87-5408 (6th)

15. Miscellaneous

Soctt v. PHC-ELKO, 99-16755 (9th Cir. 2000) (reinstatement of employee engaged in 8(a)(1) protected concerted activity)

Dauman Recycling, Inc., 22-CA-18105 (3d Cir. 1992) (opposition to employer stay motion against *Gissel* bargaining order)

Tennessee Electric Company, 10-CA-24854 (6th Cir. 1991) (memo of points and draft petition dealing with 8(a)(1) lawsuit)

Kingsbury Mini Motors of America, Inc., 3-CA-15824 (2d Cir. 1992) (8(a)(1) denial of access to property which leads to employee's criminal prosecution for trespass; TRO requested)

16. Contempt

Pascarell v. Consec Security, 98-5013 (3d Cir. 1998) (failure to restore court-ordered wage rate)

Clark v. United Mine Workers, 90-2068, 91-2016 (4th) (union agency; civil contempt)

APPENDIX F

17. Special Motions Pending Appeal or to Amend Judgment

Pye v. Excel Case Ready, 00-1632 (1st Cir.) (opposition to motion for stay; nip-in-the-bud, 8(a)(3) discharges)

Dunbar v. Landis Plastics, 98-6042 (2d Cir.)[2] (oppstay; nip-in-the-bud, 8(a)(3) discharges)

Lightner v. Dauman Pallet, 9205529 (3d Cir.) (oppstay; *Gissel*)

D'Amico v. Townsend Culinary, 98-2523 (4th Cir.) (oppstay; withdrawal of recognition, unilateral changes)

Bloedorn v. Wire Products, 95-3656 (7th Cir.) (oppstay; withdrawal of recognition, tainted petition)

Scott v. California Cedar, 00-15095 (9th Cir.) (oppstay; undermining representative, wage restoration)

Bernstein v. Carter & Sons Freightways, 97-3324 (10th Cir.) (oppstay; *Gissel*, restoration order)

Arlook v. Lockheed Georgia Employees' Federal Credit Union, 96-8016 (11th Cir.) (oppstay; *Burns* successor)

[2] The Second Circuit limits briefs in support of or opposition to motions to no more than 10 pages.

APPENDIX G

MODEL "JUST AND PROPER" ARGUMENTS

APPENDIX G

APPENDIX G-1

NON-*GISSEL* INTERIM BARGAINING ORDERS AGAINST EMPLOYERS UNDER SECTION l0(j) OF THE ACT

> The following argument should be included in the "just and proper" section of the memorandum of points and authorities submitted to the district court to support a request for an interim bargaining order against an employer in non-*Gissel* cases. Regional offices should select only the arguments that are relevant to the facts in their 10(j) case. Where lengthy string-cites appear, choose the precedent which will be persuasive in the jurisdiction in which the case will be heard. Sections enclosed in brackets "[]" should be included where appropriate.

The resolution of economic disputes in private industry through the peaceful mechanism of collective bargaining between employers and labor organizations lies at the foundation of the Congressional purpose for the Act. See Section 1 of the National Labor Relations Act, 29 U.S.C. Sec. l5l ("the Act"); *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401-402 (l952). Similarly, such promotion of good faith negotiations also is a primary consideration underlying the enactment of Section l0(j) in l947. See S. Rep. No. l05, 80th Cong., 1st Sess. 8 (l947), *reprinted in* I NLRB, *Legislative History of the Labor Management Relations Act*, *l947*, at 4l4 (l985) (hereinafter *Legislative History*); 93 Cong. Rec. 1912 (March 10, 1947) (statement of Senator Morse), *reprinted in* II *Legislative History*, at 985.[1]

Interim injunctive relief under Section l0(j) is therefore particularly appropriate in employer refusal-to-bargain cases to ensure that legitimate bargaining rights "should not be lost or frittered away through the actions of persons violating the Act . . . ." *Brown v. Pacific Telephone & Telegraph Co.*, 2l8 F.2d 542, 545 (9th Cir. l955) (as

[1] Accord *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 749 (9th Cir. 1988); *Sachs v. Davis & Hemphill, Inc.*, 295 F. Supp. 142, 149 (D. Md. 1969), aff'd, 71 LRRM 2126, 2129 (4th Cir. 1969), opinion withdrawn and dismissed as moot, 72 LRRM 2879 (4th Cir. 1969).

amended) (Pope, C. J., concurring). Thus, as the Supreme Court has noted, "in the labor field, as in few others, time is crucially important in obtaining relief." *NLRB v. C & C Plywood Corp.*, 385 U.S. 42l, 430 (l967). For, a union's collective strength, an essential element for meaningful collective bargaining, can be seriously eroded during the litigation process when good faith negotiations are not occurring. As the D.C. Circuit observed,

> Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees.

International Union of Electrical Workers v. NLRB (Tiidee Products, Inc.), 426 F.2d l243, l249 (D.C. Cir.), cert. denied, 400 U.S. 950 (l970). Thus, as the D.C. Circuit further stated, an employer which chooses to unlawfully refuse to bargain with a union pending the outcome of Board administrative litigation "reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit;" and, even when the Board finally does order bargaining, the employer "may reap a second benefit from his original refusal to comply with the law; he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively." *Id.*[2]

Many courts have agreed that an employer's unlawful refusal to bargain has an inherent tendency to undermine a union's support among employees. See *Frye v. Specialty Envelope, Inc*., 10 F.3d 1221, 1227 (6th Cir. 1993); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454-55 (1st Cir. 1990); *Brown v. Pacific Telephone &*

[2] Accord *NLRB v. Schill Steel Products, Inc.*, 480 F.2d 586, 590 (5th Cir. 1973).

Telegraph Co., 2l8 F.2d at 544.[3] Cf. *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 49-50 (1987) ("'the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages membership in unions.'") (quoting *Franks Bros. v. NLRB*, 32l U.S. 702, 704 (l944)). A Board order in due course cannot restore this loss of employee support. See *Asseo v. Centro Medico del Turabo*, 133 LRRM 2722, 2729 (D. P.R. 1989), aff'd, 900 F.2d 445, 454 (1st Cir. 1990); *Squillacote v. U.S. Marine Corp.*, ll6 LRRM at 2665; *Levine v. C & W Mining Co.*, 465 F. Supp. 690, 694 (N.D. Ohio), aff'd in relevant part 610 F.2d 432, 436-437 (6th Cir. 1979). Congress enacted

[3] Accord *Calatrello v. NSA, a Div. of Southwire Co.*, 164 LRRM 2500, 2503 (W.D. Ky. 2000); *Fleischut v. Burrows Paper Corp.*, 162 LRRM 2719, 2723 (S.D. Miss. 1999); *Donner v. NRNH*, 163 LRRM 2033, 2051-2052 (W.D.N.Y. 1999); *Dunbar v. Park Assocs., Inc.*, 23 F. Supp.2d 212, 218, 159 LRRM 2353 (N.D.N.Y. 1998), aff'd mem. 166 F.3d 1200 (2d Cir. 1998); *D'Amico v. Townsend Culinary, Inc.*, 22 F. Supp.2d 480, 490-91 (D. Md. 1998); *Overstreet v. Tucson Ready Mix, Inc.*, 11 F. Supp.2d 1139, 1148-49 (D. Ariz. 1998); *Kobell v. United Refining Co.*, 159 LRRM 2762, 2767 (W.D. Pa. 1998); *Overstreet v. Thomas Davis Medical Centers, P.C.*, 9 F. Supp.2d 1162, 1166, 159 LRRM 2547 (D. Ariz. 1997); *Scott v. Pacific Custom Materials, Inc.*, 939 F. Supp. 1443, 1457 (N.D. Cal. 1996); *Nelson v. Western Plant Services*, 152 LRRM 2633, 2636 (W.D. Wash. 1996); *Asseo v. Bultman Enterprises*, 913 F. Supp. 89, 97, 151 LRRM 2509, 2512 (D. P.R. 1995); *Ahearn v. House of the Good Samaritan*, 884 F. Supp. 654, 662, 663, 149 LRRM 2469 (N.D.N.Y. 1995); *Rivera-Vega v. ConAgra, Inc.*, 876 F. Supp. 1350, 1370 (D. P.R. 1995), aff'd, 70 F.3d 153, 161, 164 (1st Cir. 1995); *Hoffman v. Hartford Hospital*, 149 LRRM 2248, 2250, No. CIV. 3:94CV02204 PCD, 1995 WL 420821, at *3, (D. Conn. 1995); *Watson v. Moeller Rubber Products*, 140 LRRM 2449, 2455 (N.D. Miss. 1992); *Asseo v. El Mundo Corp.*, 706 F. Supp. 116, 129, 130 LRRM 3159 (D. P.R. 1989); *Gottfried v. Purity Systems, Inc.*, 707 F. Supp. 296, 303, 304, 129 LRRM 2836 (W.D. Mich. 1988); *Hirsch v. Tube Methods, Inc.*, 125 LRRM 2198, 2207-2208 (E.D. Pa. l986); *Squillacote v. U.S. Marine Corp.*, ll6 LRRM 2663, 2665 (E.D. Wis. l984); *Eisenberg v. Suburban Transit Corp.*, ll2 LRRM 2708, 27l2 (D. N.J. l983), aff'd mem. 720 F.2d 66l (3d Cir. l983); *Little v. Western Kentucky Gas Co.*, 77 LRRM 3027, 3029 (W.D. Ky. l97l); *Sachs v. Davis & Hemphill, Inc.*, 295 F. Supp. 142, 148, 70 LRRM 2399 (D. Md. 1969); *Davis v. Huttig Sash and Door Co.*, 288 F. Supp. 82, 85-86, 68 LRRM 2936 (W.D. Okla. l968); *Hoban v. Connecticut Foundry Co.*, 62 LRRM 2l39, 2l4l (D. Conn. l966); *LeBus v. Manning, Maxwell & Moore, Inc.*, 2l8 F. Supp. 702, 709, 54 LRRM 2122 (W.D. La. l963); *Madden v. Alberto-Culver Co.*, 49 LRRM 25l6, 25l8 (N.D. Ill. l96l).

Section l0(j) precisely to allow the Board, in its discretion, to seek injunctive relief in just such situations where a Board order in due course could not adequately restore the status quo ante. See S. Rep. No. l05, 80th Cong., 1st Sess. 27 (l947), *reprinted in* I *Legislative History*, at 433.

While an employer is thus benefiting by its unlawful refusal to bargain pending Board litigation, the unit employees contemporaneously and irreparably suffer the loss of the benefits of good faith collective bargaining. That loss, which goes beyond wages to include such items as job security, safety and health conditions, and the protection of a grievance-arbitration procedure, cannot be made whole by a Board order in due course. See *Pascarell v. Gitano Group, Inc.*, 730 F. Supp. 616, 625 (D. N.J. 1990); *Asseo v. Centro Medico del Turabo*, 133 LRRM at 2729; *Squillacote v. U.S. Marine Corp.*, ll6 LRRM 2663, 2665-66 (E.D. Wis. l984); *DeProspero v. House of the Good Samaritan*, 474 F. Supp. 552, 559 (N.D.N.Y. l978); *Levine v. C & W Mining Co.*, 465 F. Supp. at 694.[4]

Further, to the extent that an interim bargaining order will promote industrial peace and prevent unwarranted labor unrest and strikes, it is "just and proper" under Section l0(j) for a district court to grant such relief here. See *Rivera-Vega v. ConAgra, Inc.*, 876 F. Supp. 1350, 1370 (D. P.R. 1995)(absent a bargaining order, the "unlawful refusal to bargain will inevitably exacerbate the dispute between the parties and prolong the industrial unrest"), aff'd, 70 F.3d 153, 161, 164 (1st Cir. 1995); *Squillacote v. U.S.*

[4] Cf. *Ex-Cell-O Corp.*, 185 NLRB 107, 109-110 (1970) (Board will not order employer to pay employees monetary damages for its unlawful refusal to bargain; Board suggests "full resort" to Section 10(j) relief), remanded in relevant part, 449 F.2d 1046 (D.C. Cir. 1971), remand vacated sua sponte and Board order enforced, 449 F.2d 1058 (D.C. Cir. 1971).

Marine Corp., 116 LRRM at 2666; *DeProspero v. House of the Good Samaritan*, 474 F. Supp. at 559; *LeBus v. Manning, Maxwell & Moore*, 2l8 F. Supp. at 705-06; *Johnston v. Georgetown Steel Corp.*, 76 LRRM 25l5, 25l7 (D. S.C. l970); *Meter v. Western Iowa Pork Co.*, 63 LRRM 2503, 2505 (S.D. Iowa l966). Such an injunction promotes the Congressional policy underlying the Act to free interstate commerce from labor disruptions. *NLRB v. Jones & Laughlin Steel Corp.*, 30l U.S. l, 4l-43 (l937).

Nor would the imposition of an interim bargaining order be unduly burdensome on the Employer for "'there is nothing permanent about any bargaining order.'" *Seeler v. The Trading Port, Inc.*, 5l7 F.2d at 40 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 6l3 (l969)). Moreover, "any agreement [reached between the parties under a Section l0(j) decree] can contain a condition subsequent to take into account the possibility of the Board's rejecting the Regional Director's [theory of violation]." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d l047, l054 (2d Cir. l980).[5]

Indeed, an interim bargaining order would not ineluctably result in a labor contract calling for the payment of increased wages and benefits. The proposed 10(j) order would require only that the Employer meet with the Union and bargain in good faith -- it would not compel agreement by the Employer to any particular term or condition of employment. See Section 8(d) of the Act, 29 U.S.C. l58(d) (the "obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession").[6] If the Employer reaches a good faith impasse in bargaining, it would be

[5] Accord *Asseo v. Pan American Grain Co.*, 805 F.2d at 28; *Pascarell v. Gitano Group, Inc.*, 730 F. Supp. at 625; *Squillacote v. U.S. Marine Corp.*, ll6 LRRM 2663, 2666 (E.D. Wis. l984).

[6] Accord *Overstreet v. Thomas Davis Medical Centers*, 9 F. Supp.2d 1162, 1166 (D. Ariz. 1997); *Penello v. UMW*, 88 F. Supp. 935, 943 (D. D.C. 1950). See also *H.K. Porter*

free to implement its last proposal over which it has reached impasse. See, e.g., *Town & Country Mfg. Co. v. NLRB*, 316 F.2d 846, 847 (5th Cir. 1963).

Even if the Court is required to apply traditional equitable principles in evaluating Petitioner's request for an interim bargaining order, a balancing of the potential injuries to the parties clearly weighs in favor of granting the injunction. See *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d at 454-55. As the First Circuit stated, "If the goal of the labor laws and regulations is to strengthen the bargaining process . . . then ordering bargaining to commence cannot be contrary to the public interest." *Centro Medico*, 900 F.2d at 455 (citation omitted).

In response to these considerations, the courts have regularly granted or affirmed interim bargaining orders under Section l0(j) of the Act in a wide variety of factual settings. In addition to the cases cited above, see also *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 161, 164 (1st Cir. 1995) (bad faith bargaining; unlawful lockout); *Silverman v. Major League Baseball*, 67 F.3d 1054 (2d Cir. 1995) (unilateral changes); *Scott v. El Farra Enterprises*, 863 F.2d 670 (9th Cir. 1988) (successor); *Sheeran v. American Commercial Lines*, 683 F.2d 970 (6th Cir. l982) (unilateral changes); *Squillacote v. Advertisers Mfg. Co.*, 677 F.2d 544 (7th Cir. l982) (unilateral changes); *Morio v. North American Soccer League*, 632 F.2d 2l7 (2d Cir. l980) (unilateral changes).[7] The facts of

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Co. v. NLRB, 397 U.S. 99 (l970) (Board has no authority to order agreement to a particular bargaining proposal).

[7] Accord *D'Amico v. Cox Creek Refining Co.*, 719 F. Supp. 403, 132 LRRM 2956 (D. Md. 1989); *Ahearn v. Dunkirk Ice Cream Co.*, 133 LRRM 2088 (W.D.N.Y. 1989); *Silverman v. Reinauer Transportation Cos.*, 130 LRRM 2505 (S.D.N.Y. 1988), aff'd mem. 880 F.2d 1319 (2d Cir. 1989); *Silverman v. Imperia Foods, Inc.*, 646 F. Supp. 393, 124 LRRM 2849 (S.D.N.Y. l986); *Schneid v. Apple Glass Co.*, 123 LRRM 2329 (N.D. Ill. 1986); *Boire v. SAS Ambulance Service, Inc.*, l08 LRRM 2388 (M.D. Fla. l980), aff'd mem. 657 F.2d l249 (5th Cir. l98l); *Little v. Portage Realty Corp.*, 73 LRRM 297l, 2976

the instant case, as in the above-cited cases, warrant granting an interim bargaining order under Section 10(j).

In sum, the failure to grant an interim bargaining order here would permit the Employer to carry out its illegal objective of irreparably undermining employee support for the Union before the Board can complete its administrative processes. The Employer would thereby reap the benefits of its own misconduct and frustrate the policies and remedial purposes of the Act. This is precisely the result Section l0(j) of the Act was intended to prevent. See *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at l055; *Levine v. C & W Mining Co., Inc.*, 465 F. Supp. 690, 694 (N.D. Ohio l979), aff'd in rel. part, 6l0 F.2d 432, 436-37 (6th Cir. l979); I *Legislative History*, at 433. As the district court in *Silverman v. Imperia Foods, Inc.*, 646 F. Supp. 393 (S.D.N.Y. 1986), cogently observed in granting an interim bargaining order under Section l0(j), it is "essential not to freeze the [unlawfully created] situation, but rather to re-establish the conditions as they existed before the employer's unlawful campaign," 646 F. Supp. at 400 (citing *Seeler v. The Trading Port, Inc.*, 5l7 F.2d at 38).

Section 10(j) is an equitable provision designed to prevent violations of the Act and courts should grant interim relief "in accordance with traditional equity practice 'as conditioned by the necessities of the public interest which Congress has sought to protect.'" *Seeler v. The Trading Port, Inc.*, 5l7 F.2d at 39-40 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944)). A district court's exercise of discretion to deny an injunction in this statutory proceeding is therefore limited because a 10(j) injunction "is sought for the protection of the public interest and in aid of a policy which Congress

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(N.D. Ind. l970); *Reynolds v. Curley Printing Co.*, 247 F. Supp. 3l7, 60 LRRM 2413 (M.D. Tenn. l965).

itself has made plain . . . ." *Brown v. Pacific Telephone & Telegraph Co.*, 218 F.2d at 544 (Pope, J., concurring in reversal of denial of interim bargaining order). See also *Seeler v. The Trading Port, Inc.*, 5l7 F.2d at 39-40 ("legislative provisions calling for equitable relief to prevent violations of a statute require the courts to act in accordance with traditional equity practice 'as conditioned by the necessities of the public interest which Congress has sought to protect.'") (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944)). Accord *Miller v. California Pacific Medical Center*, 19 F.3d 449 (9th Cir. 1994) (en banc) (public interest in maintaining integrity of collective-bargaining process).

[The following sections should be included if relevant. For example, if *unilateral changes* are present, choose as appropriate from the following language:]

Because the Employer has unilaterally changed employees' terms and conditions of employment, interim rescission of those changes, upon the request of the Union,[8] is necessary to protect the collective-bargaining process and the Board's ability to fashion an appropriate final remedy[9] **[*if relevant add*:** , and to prevent irreparable harm to the

[8] See, e.g., *Children's Hospital of San Francisco*, 312 NLRB 920, 931 (1993), enf'd sub nom. *California Pacific Medical Center v. NLRB*, 87 F.3d 304, 311, 152 LRRM 2593 (9th Cir. 1996). This same remedy can be obtained in a district court under Section 10(j). See *Morio v. North American Soccer League*, 501 F. Supp. 633, 640, 106 LRRM 2761 (S.D.N.Y.), aff'd, 632 F.2d 217, 106 LRRM 2767 (2d Cir. 1980) (per curiam).

[9] See, e.g., *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246, 259, 148 LRRM 2922 (S.D.N.Y.), aff'd, 67 F.3d 1054, 1062, 150 LRRM 2390 (2d Cir. 1995)(interim rescission of unilateral change appropriate to "salvage some of the important bargaining equality that existed" prior to violations). Accord *Squillacote v. Advertisers Mfg. Co.*, 677 F.2d 544, 547, 110 LRRM 2355, 2357-58 (7th Cir. 1982); *Kobell v. United Refining Co.*, 159 LRRM 2762, 2767 (W.D. Pa. 1998); *Overstreet v. Thomas Davis Medical Centers*, 9 F. Supp.2d 1162, 1167 (D. Ariz. 1997).

status of this newly certified Union.[10] The Employer's unilateral changes threaten irreparable harm to the newly certified Union's ability to engage in effective collective bargaining for its first labor agreement.**]** Unilateral changes strike at the heart of a union's ability to represent employees by allowing an employer to enjoy the fruits of its unlawful conduct and to gain an undue bargaining advantage.[11] Thus, interim rescission of the Employer's unilateral changes is necessary **[*add if relevant*:** to avoid irreparable harm to the parties' nascent collective-bargaining relationship[12] and**]** to allow the parties to engage effectively in good faith collective bargaining while the unfair labor practice case is pending before the Board. Interim rescission restores a level playing field to the parties' collective bargaining. Otherwise, the Employer can use restoration of the working conditions as "bargaining bait" to force acceptance of its bargaining proposals.[13]

[*Substitute here if new collective-bargaining* agreement: Where a union has only recently obtained its first labor agreement, an interim bargaining order is particularly

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[10] See *Calatrello v. NSA, a Div. of Southwire Co.*, 164 LRRM 2500, 2503 (W.D. Ky. 2000)(vulnerability of recently certified union bargaining for first labor contract); *Reynolds v. Curley Printing Co.*, 247 F. Supp. 317, 320, 60 LRRM 2413 (M.D. Tenn. 1965) (discriminatory subcontracting shortly after union certified).

[11] See *The Little Rock Downtowner, Inc.*, 168 NLRB 107, 108 (1967), enf'd 414 F.2d 1084, 72 LRRM 2044 (8th Cir. 1969); *Herman Sausage Co.*, 122 NLRB 168, 172 (1958), enf'd 275 F.2d 229, 45 LRRM 2829 (5th Cir. 1960). See also *NLRB v. Katz*, 369 U.S. 736, 744, 50 LRRM 2177 (1962) (unilateral changes frustrate the statutory objective of establishing working conditions through collective bargaining).

[12] See *Calatrello v. NSA, a Div. of Southwire Co.*, 164 LRRM 2500, 2503 (W.D. Ky. 2000) (granting 10(j) bargaining order, noting vulnerability of recently certified union bargaining for first labor contract).

[13] See *Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d 270, 275 (9th Cir. 1988) (restoration of status quo ensures "meaningful bargaining"); *Florida-Texas, Inc*., 303 NLRB 509, 510 (1973), enf'd 489 F.2d 1275 (6th Cir. 1974) (unremedied unilateral subcontracting impedes the parties' bargaining process).

needed to protect the parties' collective-bargaining relationship and guarantee that in the future the employer will bargain in good faith. Courts have recognized that such unions are particularly vulnerable to employer misconduct.[14] **]**

Courts often have recognized in 10(j) proceedings that interim rescission of employer unilateral changes in working conditions is necessary to enable the parties to engage in effective collective bargaining while the case is pending before the Board.[15] Moreover, interim rescission is necessary to curb the loss of employee support for the Union caused by the unilateral changes, damage that an eventual Board order likely cannot remedy.[16] Thus, interim relief would be in the public interest to safeguard the parties' collective-bargaining relationship.

[*If an employer refuses to abide* by an agreement, insert the following]:

Interim application of the parties' collective-bargaining agreement is necessary to prevent irreparable harm to the Union's status as bargaining representative and the irremediable

[14] See *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 373, 139 LRRM 2297 (11th Cir. 1992); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 880-81, 134 LRRM 2458 (3d Cir. 1990); *Reynolds v. Curley Printing Co.*, 247 F. Supp. 317, 323-324, 60 LRRM 2413 (M.D. Tenn. 1965).

[15] See *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246, 259, 148 LRRM 2922 (S.D.N.Y.), aff'd 67 F.3d 1054, 1062, 150 LRRM 2390 (2d Cir. 1995) (interim rescission of unilateral change appropriate to "salvage some of the important bargaining equality that existed" prior to violations). Accord *Sheeran v. American Commercial Lines, Inc.*, 683 F.2d 970, 979, 110 LRRM 3168 (6th Cir. 1982); *Squillacote v. Advertisers Mfg. Co.*, 677 F.2d 544, 547, 110 LRRM 2355, 2357-58 (7th Cir. 1982); *Kobell v. United Refining Co.*, 159 LRRM 2762, 2767 (W.D. Pa. 1998) (unilateral changes during bargaining for initial agreement); *Overstreet v. Thomas Davis Medical Centers*, 9 F. Supp.2d 1162, 1167, 159 LRRM 2547 (D. Ariz. 1997).

[16] See *Eisenberg v. Suburban Transit Corp.*, 112 LRRM 2708, 2712-2713 (D. N.J.), affd. per curiam, 720 F.2d 661 (3d Cir. 1983).

loss to unit employees of the benefits of collective bargaining.[17] When an employer refuses to abide by a collective-bargaining agreement, it deprives employees of contractual protections whose loss an eventual Board order cannot retroactively remedy.[18]

[If the employer resists a *request for information* and relief is appropriate, add]:

An order directing the Employer to promptly provide the relevant information to the Union is "just and proper." The Employer has stymied the bargaining process by its unfair labor practices, including its refusal to supply the information requested. If these violations remain unremedied, bargaining will be impaired for the entire time the administrative case is before the Board. Employees will be deprived of the fruits of good faith collective bargaining while the case is pending before the Board, a loss the Board's ultimate order cannot retroactively restore.[19] To facilitate effective interim bargaining, the Employer should be required to provide promptly all relevant information requested

[17] The district court under 10(j) may order an employer to abide by the terms of an agreed-upon labor agreement. See, e.g., *Aguayo v. South Coast Refuse Corp.*, 161 LRRM 2867 (C.D. Cal. 1999).

[18] See *Wilson v. Liberty Homes, Inc.*, 500 F. Supp. 1120, ll3l, 108 LRRM 2688 (W.D. Wis. 1980), aff'd as mod. 108 LRRM 2699 (7th Cir. 1981), vacated as moot 109 LRRM 2492 (7th Cir. 1982); *Pascarell v. Gitano Group, Inc.*, 730 F. Supp. 616, 625, 133 LRRM 2906 (D. N.J. 1990).

[19] See *Levine v. C & W Mining Co.*, 465 F. Supp. 690, 694, 101 LRRM 2106 (N.D. Ohio 1979), aff'd in rel. part 610 F.2d 432, 436-37, 102 LRRM 3093 (6th Cir. 1979); *Asseo v. Centro Medico del Turabo, Inc.*, 133 LRRM 2722, 2729 (D. P.R. 1989), aff'd 900 F.2d 445, 454, 133 LRRM 3090 (1st Cir. 1990); *Pascarell v. Gitano Group, Inc.*, 730 F. Supp. 616, 625, 133 LRRM 2906 (D. N.J. 1990); *Wilson v. Liberty Homes, Inc.*, 500 F. Supp. 1120, ll3l, 108 LRRM 2688 (W.D. Wis. 1980), aff'd as mod. 108 LRRM 2699 (7th Cir. 1981), vacated as moot 109 LRRM 2492 (7th Cir. 1982).

by the Union that is necessary for collective-bargaining purposes.[20] Such relief would protect the parties' collective bargaining relationship **[If relevant add:** and would permit the Union to monitor the Employer's compliance with the current labor agreement**]**.

Based on the above, we respectfully submit that the relief requested by this Petition, particularly the interim bargaining order**[**, the interim restoration of the unilaterally changed working conditions**][**, the supply of the relevant information**]** is **[**are**]** warranted.

[20] See, e.g., *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 161 n.6, 150 LRRM 2902 (1st Cir. 1995), aff'g 876 F. Supp. 1350, 1373, 148 LRRM 3004 (D. P.R. 1995) (ordering employer to provide confidential financial information to incumbent union); *Squillacote v. Generac Corp.*, 304 F. Supp. 435, 440, 72 LRRM 2448 (E.D. Wis. 1969) (granting union access to unit employee information); *Pascarell v. Gitano Group, Inc.*, 730 F. Supp. 616, 625, 133 LRRM 2906 (D. N.J. 1990) (same); *Zipp v. Bohn Heat Transfer Group*, 110 LRRM 3013, 3015 (C.D. Ill. 1982) (information concerning relocation of unit work).

APPENDIX G

APPENDIX G 2

GISSEL BARGAINING ORDERS AGAINST EMPLOYERS

Instructions for Briefing *Gissel* 10(j) Cases and Sample Argument

The memoranda of law filed by the Regions in Section 10(j) cases include sections discussing (l) the merits of the unfair labor practice allegations under either the "reasonable cause to believe" or "the likelihood of success" standard[1] and (2) why interim relief is "just and proper" under the circumstances. This memorandum addresses the briefing of Section 10(j) cases in which the Region is seeking an interim bargaining order pursuant to *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), and the proper placement of the *Gissel* arguments therein.

In essence, a *Gissel* argument should appear in both the "merits" section of the memoranda and the "just and proper" section, although the content of the argument differs in each place. Thus, the Region should argue, as part of its "reasonable cause"/"likelihood of success" section, not only the merits of the violations alleged but also that the Board likely will issue a *Gissel* bargaining order as part of its final remedy. Specifically, the Region should argue that there is reasonable cause to believe (or, in appropriate circuits, that the Region will likely prevail in proving) that the company's unfair labor practices undermine the union's majority support and render the possibility of holding a fair election slight. In making this argument, the Region should cite appropriate in-circuit *Gissel* cases and include the relevant factual bases for this conclusion. Essentially the Region will make the same *Gissel* argument, under the "reasonable cause/likelihood of success" rubric, that it would make in its brief to the administrative law judge and/or the Board.

In the "just and proper" section of its memorandum of law, the Region should argue that an *interim Gissel* bargaining order is appropriate in the case. It should discuss why an interim bargaining order will preserve the status quo that existed before the company engaged in destructive unfair labor practices and will protect the effectiveness of the Board's ultimate *Gissel* bargaining order. As part of this analysis, the Region should cite appropriate Section 10(j) cases in which such bargaining orders were granted. It also should argue that, because the employer's unfair labor practices have forestalled the election process, the union's majority support likely will continue to deteriorate pending a final Board order (the Region should refer to any evidence showing loss of support since the unfair labor practices) and that employees will be denied the benefits of union representation pending a final Board order.

The appellate brief in *Scott v. Stephen Dunn & Associates* structured the *Gissel* argument along these lines and may be a helpful model for drafting district court papers. The arguments from that brief are attached. In addition, the Ninth Circuit analysis in

[1] The use of either the "reasonable cause" or "likelihood of success" approach depends upon which standard has been adopted by the circuit in which the case is being litigated.

APPENDIX G

Scott v. Stephen Dunn & Associates, 241 F.3d 652 (9th Cir. 2001), also follows this structure. If you need copies of the complete brief or have any questions concerning this matter, please feel free to call the ILB.

APPENDIX G

Sample *Gissel* Argument

A. The District Court Erred by Failing to Find that the Board Will Likely Granta *Gissel* Bargaining Order

The Director argued below that the violations in the instant case are so serious and substantial that the Board's traditional remedies would be unable to erase the effects of the violations and to restore the conditions necessary to conduct a fair election. Accordingly, as the Director contends, the Board will issue a remedial bargaining order under the *Gissel* doctrine.

In *NLRB v. Gissel Packing Co.*, 385 U.S. 575 (1969), the Supreme Court held that in the appropriate case, the Board may disregard the normal election process for certifying a union and may rely on authorization cards establishing a union's majority support to order an employer which has engaged in sufficiently serious and pervasive unfair labor practices to recognize and bargain with the Union without an election. This Court has also recognized that, in addition to cases marked by outrageous and pervasive employer conduct, bargaining orders are contemplated by *Gissel* in those cases (sometimes referred to as "Category II" cases) marked by "less pervasive practices" which nonetheless have the tendency to undermine a union's majority strength and impede the fair election process. *See Sahara Datsun Inc. v. NLRB*, 811 F.2d 1317, 1322 n. 4 (9th Cir. 1987); *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1368 (9th Cir.), *cert. denied* 454 U.S. 835 (1981) *See also Gissel*, 395 U.S. at 613-15.

Here, SDA retaliated against its employees through an extensive, unlawful campaign of "hallmark" and other violations from almost the moment it learned of the Union organizing effort. In late January 1999, Company officials met to discuss a business slowdown and to determine the number and identities of employees who SDA

intended to lay off for lack of work.. Nonetheless, within days of the beginning of the organizing effort, SDA discarded its layoff plans. Instead, as the district court found, the Company devised and implemented a plan to dilute the Union's strength by packing the bargaining unit with new employees who necessarily did not share their co-workers' history of long-standing grievances. Meanwhile, facility director Mottley, together with SDA president Mooradian and recruitment manager Kommit, instituted a weekly series of mandatory anti-Union meetings with employees during which, on the one hand, they unlawfully solicited employees grievances with promises to redress them should the employees reject the Union and, on the other, threatened employees with more onerous working conditions should the Union win, such as enforcing a mandatory 20-hour per week schedule, reducing breaktime and punching a time clock. The Company also discriminatorily enforced a no-distribution rule, but only as to Union election material, interrogated employees as to their intentions in the election and surveiled them during a Union meeting. Finally, in the month or so leading up to the election, the Company successfully destroyed employee support for the Union by precipitously giving employees much of what they wanted when they first contacted the Union, including an across-the-board wage raise, new telephone headsets and, on the day of the election, ergonomically correct chairs.

These violations, which form the basis of the district court's issuance of a cease-and-desist order, are so serious and substantial that they tend to undermine the Union's majority status and destroy the laboratory conditions necessary for a fair election, warranting a *Gissel* bargaining order.

APPENDIX G

In determining the need for a bargaining order, the Board and the courts recognize that certain types of violations, commonly called "hallmark violations," are so coercive that their presence will support the issuance of a bargaining order. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980). In such cases, "the seriousness of the conduct ... justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force .... [It] may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period." *Id.*

By granting a significant, unscheduled across-the-board wage increase during an organizing campaign and supplying employees with long-sought after headsets and, finally, new chairs literally hours before the election itself, SDA engaged in multiple, highly coercive "hallmark" violations. These well-timed grants of wage increases and improvements in benefits and working conditions in response to a union organizing campaign constitute hallmark violations supporting a *Gissel* bargaining order because they are likely to powerfully interfere with employee free choice. In enforcing a *Gissel* bargaining order in *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d at 1370, this Court noted that,

> [t]he wage increases, which were granted immediately prior to the election, are the most significant among the many unfair labor practices cited by the Board. It is unlikely that those who received such benefits, or who heard of them, will forget that it is the Company that has the final word on wage increases and decreases.

Accord: United Oil Mfg. Co., Inc., 254 NLRB 1320 (1981), enfd. 672 F.2d 1208, 1212 (3d Cir. 1982), *cert. den.* 459 U.S. 1036 (1982) (same); *NLRB v. Jamaica Towing*, 632 F.2d at 212-13, and cases cited at 213 n.3. And SDA's unlawful grant of higher wages

and better working conditions are "likely to convince employees that with an important part of what they were seeking in hand, union representation might no longer be needed." *Capitol-EMI Music, Inc.*, 311 NLRB 997, 1018 (1993), *enfd. mem.* 23 F.3d 339 (4th Cir. 1994). *Accord: NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1319-20 (5th Cir. 1973). *See generally*, *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), (well-timed increases in benefits likened to "a fist inside the velvet glove"). Additionally, it is difficult, if not impossible, to remedy these violations through conventional means, because "it is not the Board's policy to require that unilaterally granted benefits be rescinded." *Capitol-EMI*, 311 NLRB at 1018.

The Company engaged in another pernicious hallmark violation when it "packed" the bargaining unit with new employees just prior to the election. The Board, with Court support, has long concluded that the packing of a unit with new employees in an attempt to affect the outcome of a representation election clearly interferes with the exercise of the employees' statutory right to freely select a bargaining representative. *See, e.g.*, *America's Best Quality Coatings Corp.*, 313 NLRB 470, 471-72 (1993), *enfd.* 44 F.3d 516 (7th Cir.), *cert. den.* 515 U.S. 1158 (1995) (bargaining order warranted, in part, because "Respondent's willingness to engage in such unit packing casts serious doubt on whether a fair election could be held"); *Maxi Mart*, 246 NLRB 1151, 1160 (1979) (unlawful unit packing where four employees hired "in order to insure that the ballots of bona fide employees would be sufficiently diluted so their desire for union representation would be frustrated"). In *NLRB v. General Wood Preservative Co.*, 905 F.2d 803, 823 (4th Cir. 1990), the Court held that the employer's mere attempt to "rig" the results of an election by packing the bargaining unit with new employees just prior to a union election had "pervasive, enduring and adverse effects upon the minds" of the unit employees which necessarily undermined the integrity of the Board's processes.

Here, the Company suddenly changed its plans to layoff 15 employees almost immediately after it learned of the Union organizing drive and began instead to hire as

many new employees as possible. Manager Kommit even voiced concern that she might not be able to find sufficient applicants fast enough.. By flooding the facility with new employees on the eve of the election, some even on the last day before their eligibility as voters was to be cut off, the Company engaged in "an attack on the entire election process and the essential freedom of choice required for fair elections ... analogous to fraudulent voter registration in public elections." *Burke-Parsons Bowlby*, 288 NLRB 956, 962 (1988), *enfd. sub nom. NLRB v. General Wood Preservative Co., supra*.

Furthermore, SDA's promises of benefits contingent on the Union's defeat similarly have a substantial and lingering effect on employees. *See NLRB v. Davis*, 642 F.2d 350, 353 (9th Cir. 1981); *NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). And the interrogations of employees, surveillance of their Union activities, and the promulgation of a discriminatory no-distribution policy affecting only Union literature added to the coercive atmosphere inside the SDA facility. *See* e.g., *NLRB v. Davis*, 642 F.2d at 353; and *NLRB v. Ayer Lar Sanitarium*, 436 F.2d at 49.

The cumulative effect of these violations demonstrates a classic "carrot and stick" approach. On the one hand, SDA attempted to buy employees off with a wage raise and new equipment delivered literally hours prior to the Union election while simultaneously threatening them with a loss of "flexibility" and other major changes in their working conditions should the employees select the Union as their representative. These complementary, coercive tactics have a lasting impact on employees and support the issuance of a bargaining order. *See Adam Wholesalers, Inc.*, 322 NLRB 313, 314 (1996) (*Gissel* remedy warranted where, inter alia, employer announced incentive plan upon learning of union campaign and then threatened to withdraw the plan if the employees selected the union); *America's Best Quality Coatings Corp., supra*, 313 NLRB at 472 ("carrot and stick" approach supported *Gissel* bargaining order).

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Upper management's direct participation in the unlawful campaign serves to reinforce the coerciveness of the conduct, and together with the serious and widespread nature of these violations, makes it likely that these violations will have a continuing impact on all employees. *See NLRB v. Anchorage Times Pub. Co.*, 637 F.2d at 1370 (bargaining order warranted where "high level management personnel" committed violations and refused to disavow their coercive conduct); *Electrical Products Division of Midland-Ross v. NLRB*, 617 F.2d 977, 987 (3d Cir. 1980); *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 330 (D.C. Cir. 1989).

Moreover, the Company timed the delivery of new chairs -- a highly sought-after benefit which the Union placed in the center of its campaign -- to the start of the election when the employees' decision was fast approaching, thereby intensifying the coercion. *NLRB v. Daybreak Lodge Nursing and Convalescent Home, Inc.*, 585 F.2d 79, 82 (3d Cir. 1978) (bargaining order warranted where "many of the threats came within the couple of weeks prior to the election when they were most likely to be potent"); *NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1319-20 (5th Cir. 1973) (grant of benefits on day election petition filed recognized as especially likely to influence employees to vote against the union by destroying the union's "raison d'etre"). And the fact that every employee received the wage raise and benefit improvements and was subject to SDA's threats and promises further supports the necessity of a bargaining order. *See NLRB v. Maidsville Coal Company, Inc.*, 718 F.2d 658, 660 (4th Cir. 1983) (en banc).

In cases involving analogous conduct, the Board, with the approval of this Court, has held that an employer's misconduct was so serious and substantial as to have a lasting inhibitive effect on the majority of employees, rendering the possibility of holding a fair rerun election slight and requiring issuance of a remedial bargaining order. *See NLRB v. Anchorage Times Publishing Co., supra*; *NLRB v. Tischler*, 615 F.2d at 511 (unlawful solicitation rule, threats, promise of benefits, interrogations, creating impression of discriminatory treatment, and implying that Company would not bargain with the Union).

As the Eighth Circuit observed in an analogous context, with the grant of a wage increase, "[t]he damage had been done and the only fair way to guarantee the employee's rights was [a bargaining order]." *Tipton Electric Co. v. NLRB*, 621 F.2d 890, 898-99 (1980). Indeed, to rule otherwise would ignore the fact that the likely effect of the Company's increase is to destroy the ability of employees "'to fairly appraise the value of unionization.'" *NLRB v. Jamaica Towing, Inc.*, 632 F.2d at 213. *Accord: St. Francis Hospital v. NLRB*, 729 F.2d 844, 849-50, 855-56 (D.C. Cir. 1984) (bargaining order enforced where wage increase was the most serious violation); Texaco, Inc. v. NLRB, 436 F.2d 520, 524-25 (7th Cir. 1971) (same).

In sum there is a strong likelihood that the Regional Director will prove that these unfair labor practices are so serious and pervasive as to impede the election process, and that the Board will enter a remedial bargaining order here. Accordingly, the district court erred by failing to reach this conclusion.

B. The District Court Abused Its Discretion by Balancing the Harms in Favor of the Company

The harm to be avoided in Section 10(j) cases is "the probability that declining to issue the injunction will permit the unfair labor practices to reach fruition and thereby render meaningless the Board's remedial authority." *Miller v. California Pacific Medical Center*, 19 F.3d 449, 460-61 (9th Cir. 1994) (en banc). Notwithstanding the district court's implicit conclusion that evidence of irreparable harm is sufficient to warrant some form of injunctive relief, the court refused to order the Company to recognize and bargain with the Union. As we show below, the district court abused its discretion by concluding that the circumstances of this case were not severe enough to warrant an interim bargaining order.

APPENDIX G

1. An interim bargaining order is necessary to preserve the effectiveness of the Board's ultimate bargaining order.

Because the district court failed to correctly consider the policies that underlie a final *Gissel* bargaining order, it also failed to properly assess the need for an interim bargaining order to protect that final order. Indeed, the reasons that a final Board Gissel bargaining order is necessary to remedy these types of unfair labor practices are among the reasons that Section 10(j) interim relief is necessary. *See Levine v. C & W Mining Co.,* 610 F.2d 432, 436 (6th Cir. 1979).

Although a majority of the employees supported the Union during the organizing campaign, SDA's unfair labor practices clearly undermined that support by the time of the election. As the record evidence demonstrates, and as fully detailed in the Statement of Facts, the Union's organizing efforts precipitated a campaign of serious unfair labor practices by the Company which quickly eroded the Union's support in the bargaining unit. In less than two months after a majority of employees signed Union authorization cards, the Union could obtain only 31 votes in the election, as against 53 negative votes. The Union's severe loss of votes and ultimate election defeat occurred *after* SDA violated its employees' rights and is compelling proof of the chilling success of the Company's anti-union campaign. In addition, once the Company began to commit unfair labor practices against its employees, the Union suffered a sharp decline in attendance at Union meetings and a marked hesitancy among employees to accept Union handbills. Moreover, more than half a dozen employees told caller Marlene Tait and others that they had second thoughts about supporting the Union because they were satisfied with the raise and new chairs and headsets that the Company used to buy their support. Other employees changed their minds and decided to vote against the Union because they were afraid of losing "flexibility" in their hours and on break, just as the Company had unlawfully threatened. Three other employees state that they asked the Union to return

their authorization cards after the Company initiated its unlawful campaign; one of these employees, a former Union organizing committee member, also stopped coming to meetings because she was "scared." This chill brought on by the Company's unlawful campaign will remain in place during the pendency of the Board process and threatens the efficacy of a final Board order. *See e.g., NLRB v. Electro-Voice,* 83 F.3d at 1572 (employees' hesitancy to join in organizing effort relevant to calculate chilling effect of employer's unfair labor practices).

Absent an interim bargaining order, the Union's remaining support likely will continue to deteriorate as "working conditions remain apparently unaffected by the union or collective-bargaining order." *Asseo v. Pan American Grain Co. Inc.,* 805 F.2d 23, 27 (1st Cir. 1986), *quoting Int'l Union of Electrical, Radio & Machine Workers v. NLRB,* 426 F.2d 1243, 1249 (D.C. Cir.), *cert. denied* 400 U.S. 950 (1970). By the time a Board order issues, not only will the Union likely have lost future support, but as a practical matter, it will be seen by employees as an outsider. With the passage of time, the bargaining unit at the time of a Board order may be significantly different from the one at the time the Union attained majority status; the new unit may have significantly different problems. Thus, the Union will be unable to rely on employees to strike or otherwise support the Union's bargaining demand. In such circumstances, the Union is very unlikely to be able to negotiate a collective bargaining agreement on behalf of the unit. *See Int'l Union of Electrical, Radio & Machine Workers v. NLRB,* 426 F.2d at 1249 ("When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees"). Thus without appropriate interim relief pending the outcome of litigation, the Company reaps two benefits; it successfully avoids bargaining with the union and enjoys lower labor costs after the order to bargain either because the Union is gone or because it is too weak to bargain effectively. *Id.*

In addition, the absence of an interim bargaining order will irreparably deprive employees of the benefits of union representation while they wait for a Board order. The Board cannot remedy the potential loss in contractual benefits that results from the delay in bargaining. *See Levine v. C&W Mining Co., Inc.,* 465 F.Supp. 690, 694 (N.D. Ohio), *aff'd in rel. part,* 610 F.2d 432, 436-37 (6th Cir. 1979); *Asseo v. Centro Medico de Turabo, Inc.,* 133 LRRM 2722, 2729 (D.P.R. 1989), aff'd 900 F.2d 445 (1st Cir. 1990); *Ex-Cell-O Corp.,* 185 NLRB 107, 110 (1970), mod. 449 F.2d 1046 (D.C. Cir. 1971), *enfd.* 449 F.2d 1058 (D.C. Cir. 1971) (Board will not award damages to unit employees because of employer's unlawful refusal to recognize and bargain with union; Board suggests "full resort" to 10(j) relief). By the time the Board's remedial order issues, the Union's position may be so deteriorated that it could not effectively represent employees. *Asseo v. Pan American Grain Co.,* 805 F.2d at 27; *Seeler v. Trading Port, Inc.,* 517 F.2d 33, 38 (2d Cir. 1975).

Following this reasoning, courts have not hesitated in approving the issuance of interim *Gissel* bargaining orders in cases where, as here, an employer engages in an unlawful anti-union campaign involving hallmark as well as other violations which would nip a union organizing drive in the bud, absent appropriate injunctive relief. See *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1574-75 (7th Cir. 1996), *cert. denied* 519 U.S. 1055 (1997); *Asseo v. Pan American Grain Co.,* 805 F.2d at 28-29; *Kaynard v. MMIC, Inc.,* 734 F.2d 950, 953-54 (2d Cir. 1984). *Accord: Hombre v. KNZ Construction, Inc.,* 879 F. Supp. 451, 460-63 (E.D. Pa. 1995). In these cases, Courts have acknowledged the necessity for interim *Gissel* bargaining relief to prevent the Board's ultimate remedial bargaining order from becoming a nullity.

In sum, an interim order is necessary to preserve the effectiveness of a final Gissel bargaining order and prevent the further loss of employee support for the Union and lost contractual benefits which cannot be restored by a final bargaining order.

APPENDIX G

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-8 November 10, 1999

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Guideline Memorandum Concerning *Gissel*

I. Introduction

In *NLRB v. Gissel Packing Co.*,[1] the Supreme Court upheld the Board's authority to issue a remedial bargaining order based on union authorization cards from a majority of employees rather than an election. Such relief is appropriate when the employer commits unfair labor practices so serious that it is all but impossible to hold a fair election even with traditional Board remedies. Over the years, some of the circuit courts of appeal considering whether to enforce Board *Gissel* orders have differed with the Board's approach. In several recent decisions, the Board has explicated its views regarding the factors, including those factors emphasized by the circuit courts, relevant to determining whether a *Gissel* bargaining order is warranted. In Part II below, we identify and discuss these factors, which the Regions should rely on in determining whether to issue *Gissel* complaints. In Part III, we discuss recent problems with enforcement of Section 8(a)(1) *Gissel* cases. In order to develop a response on these issues, Regions are directed to submit to Advice all cases in which they wish to issue complaint seeking a *Gissel* order based solely on 8(a)(1) violations.

The courts have generally also accepted the propriety of interim *Gissel* bargaining orders under Section 10(j) of the Act. Where an employer's violations have precluded employees' choice regarding representation through the election process, use of Section 10(j) is particularly appropriate to preserve the effectiveness of the Board's final remedy. Accordingly, I have determined that Regions should consider 10(j) relief in all *Gissel* complaint cases and should submit each case to the Injunction Litigation Branch with a recommendation as to whether interim relief should be sought. In Part IV below, we discuss issues, particular to certain circuit courts, which the Regions should take into account in investigating and evaluating the propriety of interim *Gissel* relief.

II. The Factors Relevant to *Gissel*

A. The *Gissel* decision

In *Gissel*, the Supreme Court considered whether the Board had the authority to order an employer to bargain with a non-incumbent union on the basis of a union card

[1] 395 U.S. 575 (1969).

majority. The Court recognized that, in some cases, "an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside."[2] Declaring that "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct,"[3] the Court rejected employer arguments that such a bargaining order would prejudice employees' Section 7 rights. The Court reasoned that "[a]ny effect will be minimal . . . for there 'is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed.'"[4]

The Court identified two situations (now known as category I and category II *Gissel* cases[5]) in which employer misconduct may warrant the imposition of a card-based bargaining order remedy. Category I cases are those "exceptional" cases involving "outrageous and pervasive unfair labor practices" where the unfair labor practices are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."[6] Category II cases are "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."[7] In the latter cases, the Court held, the Board:

> can properly take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . ."[8]

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[2] 395 U.S. at 610.

[3] Id. at 612 (footnote omitted).

[4] Id. at 612, n. 33 (citation omitted).

[5] See *M.J. Metal Products, Inc.*, 328 NLRB No. 170, slip op. at 1 [1184,1184] (August 10, 1999).

[6] *Gissel*, 395 U.S. at 613-614.

[7] Id. at 614.

[8] Id. at 614-615.

B. The Board's Application of Gissel

1. Category I Cases

The category I *Gissel* case is rare. As stated above, it is confined to cases where an employer's unfair labor practices are "outrageous" and "pervasive" and have made the holding of a fair election impossible even with traditional Board remedies. The Board has found Category I misconduct where an employer, in response to a union request for recognition, discharged all, or a substantial portion, of the entire bargaining unit and made it clear to employees that the reason for the discharges was the employees' support for the union;[9] or where the employer shut down the unit and discharged the employees in retaliation for their union activities.[10]

Although the practical impact of a designation as Category I or II may seem minimal,[11] there may be some benefit to litigating a *Gissel* case as a category I case when the level of employer misconduct appears to be extraordinarily egregious. In this regard, the D.C. Circuit has held that the Board's decision to issue a *Gissel* bargaining order in Category I cases is entitled to greater deference.[12]

2. Category II cases

In Category II cases, which comprise the vast majority of *Gissel* cases, the Board determines that the employer misconduct, though not as extraordinary or pervasive as in a Category I case, is sufficiently serious that it will have a tendency to undermine the union's majority strength and make a fair election unlikely. As the Supreme Court instructed, the Board may "take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the

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[9] *Cassis Management Corp.*, 323 NLRB 456, 459 (1997), supplemented by 324 NLRB 324 (1997), enfd. mem. 152 F.3d 917 (2d Cir. 1998), cert. denied 160 LRRM 2192 (1998) (discharge of entire unit); *U.S.A. Polymer Corp.*, 328 NLRB No. 177 [1242] (August 24, 1999) numerous independent violations of Section 8(a)(1), unlawful layoff of 45% of the unit employees, including 9 of the 10 members of the employees' organizing committee and retaliatory conduct against employees who testified on behalf of the General Counsel at the unfair labor practice hearing).

[10] *Allied General Services*, 329 NLRB No. 58 [568] (September 30, 1999).

[11] At one time the Board interpreted the *Gissel* decision as authorizing the Board to issue bargaining orders in response to category I level violations even in the absence of a prior union card majority. See *United Dairy Farmers Cooperative Assn.*, 257 NLRB 772 (1981) and *Conair Corp.*, 261 NLRB 1189 (1982). The Board, however, abandoned this approach in *Gourmet Foods*, 270 NLRB 578 (1984).

[12] See *Power, Inc. v. NLRB*, 40 F.3d 409, 422 (D.C. Cir. 1994).

likelihood of their recurrence in the future."[13] A review of recent Board *Gissel* cases demonstrates that the Board examines a number of criteria relevant to these issues in determining whether to impose a *Gissel* bargaining order remedy:

- the presence of "hallmark" violations
- the number of employees affected by the violation -- either directly or by dissemination of knowledge of their occurrence among the workforce
- the size of the bargaining unit
- the identity of the perpetrator of the unfair labor practice
- the timing of the unfair labor practices
- direct evidence of impact of the violations on the union's majority
- the likelihood the violations will recur
- the change in circumstances after the violations

These factors are discussed in more detail below. When investigating a charge containing a potential *Gissel* allegation, the Regions should adduce evidence concerning, and evaluate the warrant for *Gissel* in light of, these factors.[14] Likewise in any litigation of a *Gissel* case, the record should include evidence and argument demonstrating that a *Gissel* remedy is appropriate under these factors.[15]

a. Presence of "hallmark" violations

Certain employer violations are consistently regarded by the Board and the courts as highly coercive of employee Section 7 rights. These violations, sometimes referred to as "hallmark" violations, will support the issuance of a *Gissel* bargaining order unless some significant mitigating circumstance exists.[16] Hallmark violations include plant

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[13] *Gissel*, 395 U.S. at 614.

[14] Of course, the Region must also determine whether the union obtained a valid card majority.

[15] Summary judgment motions containing a *Gissel* allegation should conform to the requirements set forth in *Allied General Services*, 329 NLRB No. 58, slip op. at 3 [at 570] (September 30, 1999).

[16] See, e.g., *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980); *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 4 [991, 994] (July 27, 1999).

closure[17] and threats thereof,[18] unlawful discharge of union adherents,[19] threats of job loss[20] or the granting of significant benefits to employees.[21] The gravity of these types of violations makes them likely to have "a lasting inhibitive effect on a substantial percentage of the work force,"[22] thus precluding a fair election even with traditional Board remedies. However, as further discussed in Part III, below, at least two circuit courts have questioned the issuance of *Gissel* bargaining orders based solely on the granting of benefits.

As detailed below, however, even when "hallmark" violations occur, other factors, such as the proportion of the unit directly affected or informed about the

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[17] *NLRB v. Jamaica Towing,* 632 F.2d at 212, citing, inter alia, *Frito-Lay, Inc.,* 232 NLRB 753, 755 (1977), enf'd as modified, 585 F.2d 62 (3d Cir. 1978).

[18] A threat of plant closure "is the one serious threat of economic disadvantage which is wholly beyond the influence of the union or the control of the employees." *NLRB v. Jamaica Towing,* 632 F.2d at 213. Accord: *Indiana Cal-Pro, Inc. v. NLRB,* 863 F.2d 1292, 1301-1302 (6th Cir. 1988) and the cases cited therein. Indeed, in *Gissel,* the Supreme Court noted that threats of plant closure are demonstrably "more effective to destroy election conditions for a longer period of time than others." 395 U.S. at 611, n. 31. Thus, repeated plant closure threats--alone--were held to warrant a remedial bargaining order in one of the cases comprising the *Gissel* decision. See *NLRB v. The Sinclair Glass Co.,* 397 F.2d 157 (1st Cir. 1968), affd. in *Gissel,* 395 U.S. at 615.

[19] The discharge of union activists is conduct which "'goes to the very heart of the Act' and is not likely to be forgotten. . . . Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity.'" *M.J. Metal Products, Inc.,* 328 NLRB No. 170, slip op. at 2 [at 1185], citing *NLRB v. Entwistle Mfg. Co.,* 120 F.2d 532, 536 (4th Cir. 1941). See also *NLRB v. Davis,* 642 F.2d 350, 354 (9th Cir. 1981)(employees are unlikely "to miss the point that backpay and offers of reinstatement made some 9 to 11 months after the discharge does not necessarily compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment.").

[20] *Garney Morris, Inc.,* 313 NLRB 101, 103 (1993), enf'd mem. 47 F.3d 1161 (3d Cir. 1995).

[21] The Board has noted that unlawfully granted benefits "are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees." *America's Best Quality Coatings Corp.,* 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir.), cert. denied 515 U.S. 1158 (1995).

[22] *NLRB v. Jamaica Towing, Inc.,* 632 F.2d at 213.

violation, or the size of the unit must also be considered. Moreover, steps that ameliorate the impact of the violations may diminish the need for *Gissel* relief.[23]

b. The number of employees affected by the violations -- either directly or by dissemination of knowledge of their occurrence among the workforce

Central to determining whether violations warrant *Gissel* relief are the number of employees directly affected by the violations. . . .[and] the extent of dissemination among employees."[24] Where a substantial percentage of employees in the bargaining unit is directly affected by an employer's serious unfair labor practices, the possibility of holding a fair election decreases.[25] Thus, discriminatory mass layoffs or discharges of most, if not all, employees in a unit are inherently pervasive.[26] So too are unlawful across-the-board wage increases or other grants of benefits and unlawful threats or promises of benefits made at captive audience meetings.[27] Where only a small portion of a unit is affected, however, even hallmark discharges may be insufficient to warrant *Gissel* relief.[28]

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[23] *Masterform Tool Co., Cylinder Components, Inc.,* 327 NLRB No. 185, slip op. at 3 [1071, 1073] (March 30, 1999) (Gissel remedy denied where certain 8(a)(1) violations were dismissed and employer recalled 6 of 7 unlawfully laid off employees after three months).

[24] *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 3 [at 993].

[25] See, e.g., *M.J. Metal Products, Inc.,* 328 NLRB No. 170, slip op. at 1 [1184] (noting that 8(a)(3) discharges constituted more than 25% of the unit); *Bonham Heating & Air Conditioning, Inc.,* 328 NLRB No. 61, slip op. at 2 [432,433] (May 19, 1999) (noting that 4 of 7 unit employees, or 40%, were unlawfully laid off); *General Fabrications Corp.,* 328 NLRB No. 166, slip op. at 2 [1114, 1115] (August 11, 1999) (noting that 7 of 31 unit employees suffered unlawful discrimination).

[26] See, e.g., *Allied General Services, Inc.,* 329 NLRB No. 58, slip op. at 3 [at 570]; *U.S.A. Polymer Corp.,* 328 NLRB No. 177, slip op. at 1[1242]; *Cassis Management Corp.,* 323 NLRB at 459 (1997).

[27] See, e.g., *Skyline Distributors,* 319 NLRB 270, 278-279 (1995), enf. denied in rel. part 99 F.3d 403, 410-412 (D.C. Cir. 1996) (grant of benefit); *Complete Carrier Services, Inc.,* 325 NLRB No. 96, ALJD slip op. at 3 and 5 [565, 567-568] (1998) (promise and grant of benefit, threat of plant closure); *Gerig's Dump Trucking, Inc.,* 320 NLRB 1017 (1996), enfd. 137 F.3d 936 (7th Cir. 1998) (grant of benefits**)**. But as to the propriety of relying solely on Section 8(a)(1) violations for *Gissel* relief, see discussion Part 0, infra.

[28] *Philips Industries, Inc.,* 295 NLRB 717, 718-719 (1989) (large size of unit diluted impact of unlawful discharges*); Pyramid Management Group, Inc.,* 318 NLRB 607, 609 (1995) (discrimination affected only small portion of unit).

Another way of examining pervasiveness is to consider how widely disseminated is knowledge of the violations among the work force.[29] Even discrimination directed toward one employee, if widely disseminated, may support the need for a *Gissel* bargaining order.[30] The manner of carrying out unlawful discrimination may also indicate a greater likelihood that the violation will have an inhibitory effect on other unit employees. Thus, where an employer overtly demonstrates its retaliatory motive for unlawful discrimination, the Board can conclude that the inhibitory impact of such violations is accentuated.[31] Similarly, where an employer carries out discrimination in a public manner, i.e., where it clearly appears that the discrimination is intended to "send a message" to other employees, the Board may conclude that the violation was widely disseminated to other employees.[32]

In contrast, the Board will not issue a *Gissel* bargaining order if the evidence shows that a substantial portion of the bargaining unit was unaware of the employer's unfair labor practices. This situation may arise in the case of threats of discharge or plant closure directed to just a small number of employees,[33] or where the employees were not aware that the discriminatee was a leading union activist.[34]

c. Size of the bargaining unit

The Board will also consider the size of the unit to determine whether an employer's serious misconduct had a pervasive effect on the workforce which precludes the effective use of traditional remedies. The Board assumes that employer unfair labor practices will have a more coercive effect on a smaller unit of employees: widespread knowledge of the violation is more likely and only a few employees can make the

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[29] See *Holly Farms Corp.*, 311 NLRB 273, 282 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. on other grounds 517 U.S. 392 (1996).

[30] See, e.g., *Traction Wholesale Center Co.*, 328 NLRB No. 148, slip op. at 21 [1058, 1075] (July 28, 1999); *Coil-ACC, Inc.*, 262 NLRB 76, 83 (1982), enfd. 712 F.2d 1074 (6th Cir. 1983).

[31] See, e.g., *U.S.A. Polymer Corp.*, 328 NLRB No. 177, slip op. at 2 at 1243].

[32] See *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 2 and 5 [at 992, 995] ("public and dramatic discharge" of discriminatee); *J.L.M. Inc. d/b/a Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993), enf. as mod. 31 F.3d 79 (2d Cir. 1994) (employer posts notice at facility that discriminatee would never work for the employer again).

[33] See *Blue Grass Industries*, 287 NLRB 274, 276 (1987) (bargaining order denied where no evidence that threats of plant closure were widely disseminated among employees in the unit).

[34] See *Munro Enterprises, Inc.*, 210 NLRB 403 (1974).

difference between a union's majority and minority support.[35] In contrast, the Board may deny a *Gissel* in a large unit, even in the face of "hallmark" unfair labor practices.[36]

d. Identity of the perpetrator of the unfair labor practice

The Board will also consider the management level of the perpetrators of the unfair labor practices in evaluating the need for a *Gissel* bargaining order. The Board has stated that "[t]he severity of the misconduct is compounded by the involvement of high-ranking officials."[37] The Board has observed that "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[38]

This is not to say that the Board will deny a *Gissel* bargaining order when the unfair labor practices are committed only by first-line supervisors. In this regard, the Board has noted that "the words and actions of immediate supervisors may in some circumstances leave the strongest impression."[39]

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[35] See *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 5 [at 995] (gravity of impact of violations heightened in relatively small unit of 25 employees); *Traction Wholesale,* 328 NLRB No. 148, slip op. at 21 [at 1075] (same, 20 person unit); *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 694 (7th Cir. 1982) (impact of unfair labor practices increased in "small unit" of 42 employees*); NLRB v. Bighorn Beverage,* 614 F.2d 1238, 1243 (9th Cir. 1980) ("probable impact of unfair labor practices is increased when a small bargaining unit . . is involved and increases the need for a bargaining order").

[36] See *Philips Industries*, 295 NLRB 717, 718-719 (1989) ("the effect of violations is more diluted and more easily dissipated in a larger unit" of 90 employees); *Beverly California Corp.*, 326 NLRB No. 30, slip op. at 4 [232, 235] (1998) (*Gissel* not warranted where unit was "sizeable" (92-103 employees) and violations generally did not affect a significant number of employees).

[37] *M.J. Metal Products, Inc.*, 328 NLRB No. 170, slip op. at 2 [at 1185], citing *Consec Security*, 325 NLRB No. 71, slip op. at 2 [453, 454] (1998). Accord: *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 481 (7th Cir. 1994).

[38] *M.J. Metal Products, Inc.*, 328 NLRB No. 170, slip op. at 2 [at 1185]. See also id. at n. 9 and cases cited therein; *Bakers of Paris*, 288 NLRB 991, 992 (1988), enfd. 929 F.2d 1427 (9th Cir. 1991) ("The effect of unfair labor practices is increased when the unlawful conduct is committed by top management officials, who are readily perceived as representing company policy and in positions to carry out their threats . . . .").

[39] *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 4 [at 994]. See also *C & T Manufacturing Co.*, 233 NLRB 1430 (1977) ("Threats from a so-called first-line supervisor, accompanied by use of the names of company officials . . . are as coercive upon the employees as if made by the company officials themselves . . . .").

e. The timing of the unfair labor practices

The Board often highlights the timing of the unfair labor practices to justify the imposition of a *Gissel* bargaining order. An employer's swift reaction to union activity is an indication of the coercive effect of unlawful conduct and the effect of unfair labor practices is increased when the unlawful conduct begins "on the Employer's acquiring knowledge of the advent of the Union. . . ."[40] Similarly, an employer's continued misconduct after the holding of a representation election will further diminish the effectiveness of traditional remedies.[41]

f. Direct evidence of impact of the violations on the union's majority

A *Gissel* remedy may also be supported if the record reveals actual damage to the union's card majority such as a discrepancy between the number of card signers and the number of votes cast for the union in an election.[42] Other evidence of actual loss includes employee revocation of union cards or a marked fall-off of employee participation in union activities such as attendance at union meetings, distribution of literature, wearing union paraphernalia.

On the other hand, the Board has also held that traditional remedies may be insufficient to correct an employer's violations even where a union subsequently obtains a card majority[43] or even where the union might ultimately be certified in an unresolved

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[40] *Bakers of Paris,* 288 NLRB at 992. See also *M.J. Metal Products,* 328 NLRB No. 170, slip op. at 2 [at 1185]; *State Materials, Inc.,* 328 NLRB No. 184, slip op. at 1 [1317, 1317] (August 31, 1999) (unfair labor practices began immediately after union organizing campaign commenced); *Joy Recovery Technology Corp.*, 320 NLRB 356, 368 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998) (employer's "prompt" response); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enf'd. 44 F.3d 516 (7th Cir.), cert. denied 515 U.S. 1158 (1995) (impact magnified by the fact that it occurred on the day after the union demanded recognition).

[41] *General Fabrications Corp.*, 328 NLRB No. 166, slip op. at 2 [at 1115], citing *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995).

[42] See *J.L.M., Inc.*, 312 NLRB 304, 305 (1993), enf. denied on other grounds, 31 F.3d 79 (2d Cir. 1994) ("clear dissipation of union support" revealed by the stark drop from card majority of 128 to only 62 votes in election).

[43] See discussion and cases cited in *Weldun International,* 321 NLRB 733, 735-736 (1996), enf. denied in rel. part 165 F.3d 28, 1998 WL 681252 (6th Cir. 1998) (unpublished decision).

Board election.[44] Regions should be aware, however, that this view is not universally accepted by the courts of appeals (see discussion at 0 below).

g. The likelihood the violations will recur

The *Gissel* determination turns not only on the extensiveness of the past violations but also the likelihood of their recurrence in the future.[45] The Board has held that post-election violations evidence a strong likelihood that unlawful conduct will recur in the event another organizing effort occurs in connection with a Board-ordered re-run election.[46] Moreover, the violations may themselves demonstrate the tenacity of an employer's commitment to thwart the union and permit the inference that violations are likely to recur.[47]

h. Change in circumstances after the violations

Gissel respondents typically move the Board to consider evidence of a change in circumstances since the administrative hearing which, they argue, would support the denial of a bargaining order. The change in circumstances which they believe should obviate the need for a *Gissel* bargaining order includes the passage of time since the violations occurred and the turnover of employees or management.[48] The Board generally denies respondents' motions to reopen the record to consider such evidence.[49] However, while denying the motion, the Board generally discusses the evidence as

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[44] See, *General Fabrications Corp.,* 328 NLRB No. 166, slip op. at 3 [at 1116], n. 17 (and cases cited therein).

[45] Id., slip op. at 1.

[46] Id., slip op. at 2; *Bonham Heating & Air Conditioning, Inc.,* 328 NLRB No. 61, slip op. at 3 [at 434].

[47] *Bonham Heating & Air Conditioning, Inc.,* id., slip op. at 3 [at 434] ("the depth of the Respondent's disregard for employee rights is evidenced by the extreme measures it took to defeat the employees' organizational efforts").

[48] The courts are almost unanimous in requiring that the Board consider the relevance of changed circumstances. See *Flamingo Hilton-Laughlin v. NLRB,* 148 F.3d 1166, 1170-1172 and cases cited at n. 4 (D.C. Cir. 1998). The Ninth Circuit is the only circuit which does not require the Board to consider post-hearing changed circumstances. See *NLRB v. Bakers of Paris,* 929 F.2d 1427, 1448 (9th Cir. 1991).

[49] See *Garvey Marine, Inc.,* 328 NLRB No. 147, slip op. at 5 and 7 [at 995, 997] (employee turnover and passage of time, citing *Salvation Army Residence,* 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990)).

proffered and provides a full discussion as to whether such changes would mitigate the need for a Gissel bargaining order.[50]

Resort to 10(j) proceedings in *Gissel* cases, as discussed in Part 0 below, may minimize the delay that permits changed circumstances to become an issue in *Gissel* cases. However, in those cases where the issue is raised, the Regions must be prepared to argue, in rejecting a respondent's offer of proof, why the evidence offered would not mitigate the need for a *Gissel* bargaining order.

III. *Gissel* and Section 8(a)(1) violations

Gissel cases that involve only allegations of Section 8(a)(1) present a unique problem and should, henceforth, be submitted to Advice on whether to issue a *Gissel* complaint. These cases generally involve either threats of plant closure, or promises or grants of benefits, or a combination of both. Historically, the Board, with court approval, has considered these violations of the "hallmark" variety which, even in the absence of Section 8(a)(3) misconduct, may be sufficient to warrant the need for a *Gissel* bargaining order.[51] However, the viability of these 8(a)(1) *Gissels* has become less certain in recent years, as several of the courts of appeals have not accepted the Board's view of these violations as "hallmark" and declined to enforce the Board's decisions.

For instance, the Sixth and D.C. Circuits have questioned the notion that an unlawful grant of benefits is a "hallmark" violation which may justify the imposition of a Gissel bargaining order. In *DTR Industries, Inc.*,[52] the Sixth Circuit indicated that it does not consider an unlawful wage increase to be a hallmark violation. And, in *Skyline Distributors,* the D.C. Circuit stated that there was "almost no judicial authority supporting a Gissel bargaining order based solely on the grant of economic benefits."[53]

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[50] See, e.g., *Garvey Marine, Inc.*, 328 NLRB No. 147, slip op. at 5-7 [at 995-997] and fn. 14; *State Materials,* 328 NLRB No. 184, slip op. at 1-2 [1317, 1317-1318].

[51] See *NLRB v. So-Lo Foods, Inc.*, 985 F.2d 123, 125-126 (4th Cir. 1992) (*Gissel* bargaining order appropriate where employer accompanied grant of benefits with, inter alia, threats of plant closure); *Indiana Cal-Pro, Inc. v. NLRB,* 863 F.2d 1292 (6th Cir. 1988) (threats of plant closure with minor 8(a)(1)'s); *NLRB v. Ely's Foods,* 656 F.2d 290 (8th Cir. 1981) (threats of closure and promise of wage increase); and *NLRB v. Dadco Fashions,* 632 F.2d 493 (5th Cir. 1980) (threats of plant closure and other 8(a)(1)'s). See also *Tower Records,* 182 NLRB 382, 387 (1970), enfd. mem. 79 LRRM 2736 (9th Cir. 1972) (*Gissel* order based on wage increase: "It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed.").

[52] 39 F.3d 106, 115 (6th Cir. 1994).

[53] *Skyline Distributors v. NLRB,* 99 F.3d 403, 410 (D.C. Cir. 1996). Apart from the court's refusal to uphold the *Gissel* bargaining order, Judge Edwards, writing for the

In addition, in several cases in which the Board relied on unlawful threats of plant closure to support a *Gissel* order, the Board failed to obtain enforcement of the *Gissel* order because the courts disagreed that the employers' statements were unlawful threats, finding them instead to be protected speech under Section 8(c) of the Act.[54]

In at least one recent case, the Board issued a *Gissel* bargaining order based only on Section 8(a)(1) threats of plant closure and unlawful grants of benefits.[55] The Board has yet to fully address the implications of these decisions, however. In order to develop a coordinated response to the positions taken by the courts, these cases should be submitted for advice on the merits of whether to issue a *Gissel* complaint.

IV. Interim *Gissel* Orders under Section 10(j)

A. The Effectiveness of *Gissels* 10(j)

From FY 1990 through FY 1998, the Board issued decisions in 119 ULP cases involving a request for a *Gissel* bargaining order. In a comparable nine year period, however, the Board sought a Section 10(j) interim *Gissel* bargaining order in only 68 cases. Thus, Regions have issued and litigated dozens of *Gissel* unfair labor practice complaints without the benefit of parallel 10(j) proceedings.

Those benefits can be substantial. In 69% of the 68 10(j) cases (47 out of 68 cases), the injunction case was resolved favorably, either through settlement (28 cases) or a favorable decision by a district court (19 cases).[56] Further, in only two of the favorably resolved 10(j) cases did the underlying ULP case go before a circuit court for Section 10(e)-10(f) enforcement of the Board's order.[57] Thus, in many cases, with 10(j) relief, the

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majority, expressed profound disagreement with the Supreme Court's determination that the grant of a wage increase may constitute an unfair labor practice. See, id. at 408-409, discussing *NLRB v. Exchange Parts, Co.,* 375 U.S. 405 (1964).

[54] See *Be-Lo Stores v. NLRB,* 126 F.3d 268, 285-286 (4th Cir. 1997); *Kinney Drugs, Inc.,* 74 F.3d 1419, 1427-1428 and 1429 (2d Cir. 1996); *DTR Industries, Inc. v. NLRB,* 39 F.3d at 114; and *Crown Cork & Seal Co. v. NLRB,* 36 F.3d 1130, 1133-1136 (D.C. Cir. 1994).

[55] See *Complete Carrier Services, Inc.,* 325 NLRB No. 96 [565] (1998) (*Gissel* bargaining order based on promise and grant of wage increase and threats of plant closure; no 8(a)(3) discharges or layoffs). See, also *Wallace Int'l,* 328 NLRB No. 3 [29] (April 12, 1999) (threats of plant closure and promises of wage increases are "likely to have a pervasive and lasting deleterious effect on the employees' exercise of their Section 7 rights," and Board would "normally consider issuing a *Gissel* bargaining order in these circumstances," but denies *Gissel* based on "unjustified delay" in deciding the case.

[56] The 19 wins were 48% of the *Gissel* 10(j) cases litigated to a court decision in this period.

[57] The Board was successful before the courts in both those cases.

entire underlying labor dispute can be resolved short of the full litigation through circuit court enforcement of a final Board order.

In contrast, absent 10(j) relief, enforcement of a *Gissel* bargaining obligation is often delayed for several years as the case is litigated before the Board and circuit courts. During that time, "the union's position in the plant may have already deteriorated to such a degree that effective representation is no longer possible."[58] Legal commentators have noted that an ultimate *Gissel* bargaining order issued by the Board often does not produce a viable and enduring bargaining relationship.[59] Lengthy enforcement litigation also leaves the Board's *Gissel* order vulnerable to an employer's passage of time and changed circumstances defenses.[60] Thus, it appears that the most effective and successful vehicle for gaining *Gissel* relief includes petitioning a district court for an interim bargaining order under Section 10(j) soon after an administrative complaint issues.[61]

Accordingly, whenever a Region is investigating the propriety of issuing a *Gissel* complaint, it should also investigate and consider the propriety of seeking a 10(j) *Gissel* order. Any case in which a Region issues a *Gissel* complaint should be submitted to the Injunction Litigation Branch, Division of Advice, with a recommendation regarding Section 10(j) *Gissel* relief.[62]

In evaluating the propriety of 10(j) *Gissel* relief, the Regions should consider not only the criteria discussed above relevant to the issuance of a *Gissel* complaint but should also be mindful of the treatment accorded *Gissel* bargaining order remedies by the circuit

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[58] *Seeler v. Trading Port, Inc.,* 517 F.2d 33, 37-38 (2d Cir. 1975).

[59] See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 Harv. L. Rev. 1769, 1795 (1993); see also Bethel, *The Failure of Gissel Bargaining Orders,* 14 Hofstra Lab. L.J. 423 (1997).

[60] Under the Board's Rules and Regulations, Section 102.94(a), whenever a district court grants an injunction under Section 10(j), the Board obligates itself to expedite the underlying unfair labor practice proceeding. Such expedition may further limit the development of changed circumstances in the administrative case.

[61] Such relief preserves the Board's ability to effectively remedy the violations either in the form of a remedial bargaining order or an election. See *Seeler v. Trading Port, Inc.,* 517 F.2d at 38. In one instance involving a decertification petition rather than an initial representation petition, the Board's final order was a re-run election rather than a *Gissel*-type bargaining order where the status quo had previously been restored through the grant of an interim bargaining order under Section 10(j). See *Eby-Brown Co. L.P.,* 328 NLRB No. 75, slip op. at 3-4 [496, 498-499] (May 26, 1999).

[62] The Region's submission may recommend against 10(j) proceedings. Of course, if a case poses a close issue on the merits of the *Gissel* bargaining order remedy, the Region may also submit the case to the Division of Advice on the merit issue.

court in which the 10(j) case would be litigated. Issues specific to the circuit courts are discussed below.

B. Circuit Court Considerations

1. Criticism of the Board's failure to articulate the need for a *Gissel* bargaining order

The Second, Fourth, Sixth and D.C. Circuits have expressed dissatisfaction with the level of the Board's discussion and analysis of the need for a *Gissel* order in lieu of traditional non-bargaining order remedies.[63] Thus, in evaluating and litigating a *Gissel* 10(j) case, the Regions should consider the evidence relevant to the *Gissel* factors discussed in Part II, above, and explain how the evidence supports the need for a *Gissel* bargaining order.

In particular, these courts criticize the Board for failing to consider or explicate why traditional remedies would not suffice to ensure a fair election.[64] The Regions should therefore specifically explain why traditional Board remedies will not suffice to remedy an employer's serious and pervasive unfair labor practices. In this regard, the Regions may focus on the particular nature of the violations, or the circumstances in which they were committed, to demonstrate why traditional remedies will not suffice to allow the Board to conduct a free and fair election untainted by the effects of the employer's unfair labor practices.

2. Requiring proof of a "causal connection"

The Sixth and Fourth Circuits have suggested the necessity in *Gissel* cases for proof of a "causal connection" between the unfair labor practices and the inability to hold a fair election.[65] Thus, in *M.P.C. Plating, Inc. v. NLRB*, the Sixth Circuit held that, to justify a *Gissel* bargaining order, the Board "must make factual findings and must support its conclusion that there is a causal connection between the unfair labor practices and the probability that no fair election could be held."[66]

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[63] See, e.g., *Harpercollins San Francisco v. NLRB,* 79 F.3d 1324, 1333 (2d Cir. 1996); *Be-Lo Stores v. NLRB,* 126 F.3d 268, 282 (4th Cir. 1997); *NLRB v. Taylor Machine Products, Inc.,* 136 F.3d 507, 520 (6th Cir. 1998); *Flamingo Hilton-Laughlin v. NLRB,* 148 F.3d 1166, 1173 (D.C. Cir. 1998).

[64] See cases cited in preceding footnote.

[65] See *M.P.C. Plating, Inc. v. NLRB,* 912 F.2d 883, 888 (6th Cir. 1990); *NLRB v. Taylor Machine Products, Inc.,* 136 F.3d at 519; and *Be-Lo Stores v. NLRB,* 126 F.3d at 282. But, in the Fourth Circuit compare *NLRB v. CWI of Maryland, Inc.,* 127 F.3d 319, 334 (4th Cir. 1997), where the court upheld the bargaining order and made no reference to the requirement of a causal connection.

[66] 912 F.2d at 888.

Although this requirement is arguably inconsistent with the test as enunciated in *Gissel*, which spoke of violations that "have the *tendency* to undermine majority strength and impede the election processes,"[67] it is nevertheless binding on district courts which sit in these circuits. In our view, the type of evidence required to meet this standard is akin to "impact" evidence adduced in typical 10(j) proceedings. Thus, in order to demonstrate that an interim *Gissel* bargaining order under Section 10(j) is "just and proper" and necessary to prevent "irreparable harm," Regions can adduce evidence to prove the adverse effects of the unfair labor practices on employee support for the union, including, where available, the actual loss of majority support.[68] Therefore, where such evidence is available, the Regions should continue to demonstrate the actual adverse impact of the violations upon the union's majority support in both the ULP proceeding and the 10(j) litigation.

3. Whether a union's success in obtaining or holding employee support after an employer's unfair labor practices negates the need for a *Gissel* bargaining order

Some courts have upheld the Board's view that traditional remedies may be insufficient to correct an employer's violations even where a union subsequently obtains a card majority[69] or even wins a representation election.[70] These courts have relied upon the egregiousness of the unfair labor practices, the employer's continued misconduct, the effect of cumulative misconduct and the avoidance of further delay from ordering a rerun election instead of an immediate bargaining order.[71] In contrast, the Fourth, Sixth and Eighth circuits have held that a union's continued success was proof that a fair election could be held.[72] The Regions should continue to adhere to the Board's view when issuing

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[67] 395 U.S. at 614 (emphasis added).

[68] See, e.g., *Seeler v. The Trading Port, Inc.*, 517 F.2d at 37-38. See also Part 0, supra.

[69] See *Davis Supermarkets, Inc. v. NLRB,* 2 F.3d 1162, 1175 (D.C. Cir. 1993), discussing *United Oil Mfg. Co., Inc. v. NLRB,* 672 F.2d at 1212 and *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981) (en banc), cert. denied 455 U.S. 940 (1982).

[70] See *Power, Inc. v. NLRB,* 40 F.3d 409, 423 (D.C. Cir. 1994).

[71] See, e.g., *Power, Inc. v. NLRB, id*.

[72] See *NLRB v. Weldun Int'l, Inc.*, 165 F.3d 28, 1998 WL 681252 (6th Cir. 1998) (unpublished order) (denying enforcement of *Gissel* bargaining order based, in part, on union's obtaining additional signed authorization cards after an unlawful layoff); *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 1000-1001 (4th Cir. 1979) (where union received "substantial majority" of unchallenged votes cast in election, no reasonable basis for finding that employer's misconduct made a fair election unlikely); and *Arbie Minerals Feed Co. v. NLRB,* 438 F.2d 940, 945 (8th Cir. 1971)(declining to enforce *Gissel* bargaining order where union obtained 11 of its 14 authorization cards after most of the employer's unfair labor practices).

Gissel complaints which may ultimately be litigated in these courts.[73] However, when evaluating their *Gissel* cases for the propriety of seeking 10(j) relief in any district court which sits in the Fourth, Sixth or Eighth circuit, the Regions should consider this issue and address it in their 10(j) memorandum.

IV. Conclusion

Any questions regarding the implementation of this memorandum should be directed to the Division of Advice; questions regarding issuance of a complaint should be addressed to the Regional Advice Branch; questions regarding Section 10(j) *Gissels* should be addressed to the Injunction Litigation Branch.

/s/
F. F.

[73] See discussion, infra., at Part II.B.2.f.

APPENDIX G

APPENDIX G-3

MODEL ARGUMENTS IN SUPPORT OF INTERIM REINSTATEMENT

The following arguments can be made in 10(j) cases where the Region is seeking interim reinstatement of alleged discriminatees. The Regions should use arguments made to the Board and any others that are appropriate, depending on whether there is any evidence supporting a claim of, e.g., "chilling" impact, "scattering" of discriminatees or the hiring of replacements. Where string cites appear, Regions should choose only those that will be persuasive in their jurisdictions. Passages in **bold type** within brackets [_] are either internal operating instructions or inserts to be used if applicable to a particular case.

I. AFFIRMATIVE ARGUMENTS FOR INTERIM REINSTATEMENT

A. Interim Reinstatement Is Needed to Ensure Employees that They Are Free to Engage in Section 7 Activities

1. Section 8(a)(3)

It is well recognized that an employer's discriminatory discharge **[or demotion, transfer, etc . . .]** of an employee, especially a union activist, has a "chilling effect" on the remaining employees' **[willingness to openly engage in protected union activity/ freedom to choose an exclusive bargaining representative]**.[1] Such unfair labor practices linger in the collective memory of the shop.[2] Unless interim reinstatement is

[1] See *Ahearn v. Jackson Hospital Corp.,* 351 F.3d 226, 239 (6th Cir. 2003); *Schaub v. West Michigan Plumbing & Heating, Inc.,* 250 F.3d 962, 971 (6th Cir. 2001); *Pye v. Excel Case Ready,* 238 F.3d 69, 74-75 (1st Cir. 2001) ("discharge of active and open union supporters . . . risks a serious adverse impact on employee interest in unionization"); *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1573 (7th Cir. 1996) ("...the employees remaining at the plant know what happened to the terminated employees, and fear that it will happen to them"), cert. denied 519 U.S. 1055 (1997); *Pascarell v. Vibra Screw, Inc.,* 904 F.2d 874, 880 (3d Cir. 1990) ("chilling effect that [employer's] actions had on collective activity is patent from the nature and extent of the discharges"); *Kaynard v. Palby Lingerie, Inc.,* 625 F.2d 1047, 1053 (2d Cir. 1980) (discharge of known union activists "risked a serious impact on employee interest in unionization"); *Mattina v. Chinatown Carting Corp.,* 290 F. Supp. 2d 386, 395 (S.D.N.Y. 2003); *Sharp v. Ashland Construction Co., Inc.,* 190 F. Supp. 2d 1164, 1171 (W. D. Wis. 2002); *Blyer v. P & W Electric, Inc.,* 141 F. Supp. 2d 326, 330 (E.D.N.Y. 2001); *Dunbar v. Northern Lights Enterprises, Inc.,* 942 F. Supp. 138, 147 (W.D.N.Y. 1996).

[2] See *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1572 (7th Cir. 1996) ("'common sense recognizes the dramatic and long term effects' of such activity") (quoting *Justak Bros. &*

promptly obtained, this unlawful retaliation against employees who have exercised their statutory right to support a labor organization will stand as a clear and forceful message to the remaining employees that they should not engage in any pro-union activities. This is true even if only one or relatively few of the union activists are unlawfully discharged.[3] The remaining employees will understand that supporting the union or engaging in other protected activity will likely result in their discharge **[or demotion, transfer, etc . . .]** and that neither the Board nor the union can protect them in an effective or timely manner.[4]

Co., Inc. v. NLRB, 664 F.2d 1074, 1082 (7th Cir. 1981)). See generally *NLRB v. Atlas Microfilming, Div. of Sertafilm, Inc.*, 753 F.2d 313, 319 (3d Cir. 1985) (discharge of union activist and threats of plant closure seen as "having a continuing impact"); *Standard-Coosa-Thatcher Carpet Yarn Division, Inc. v. NLRB*, 691 F.2d 1133, 1144 (4th Cir. 1982) (ULPs including discriminatory discipline of union activist tends to have a "lasting inhibitive effect"); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-213 (2d Cir. 1980) ("hallmark violations," such as discriminatory discharges, are "likely to have a lasting inhibitive effect on a substantial percentage of the work force"); *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 498 (5th Cir. 1980) ("the knowledge and threatening effects of the company's [egregious unfair labor practices] might certainly have remained" in the memory of the surrounding community).

[3] See *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 971 (6th Cir. 2001) (1 employee); *Silverman v. JRL Food Corp.*, 196 F.3d 334, 338 (2d Cir. 1999) (1 employee); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980) (2 out of 50 person unit); *Lineback v. Printpack, Inc.*, 979 F. Supp. 831, 847-850 (S.D. Ind. 1997) (1 out of at least 150 employees); *D'Amico v. United States Service Industries, Inc.*, 867 F. Supp. 1075, 1086-87, 1092 (D. D.C. 1994) (10 out of 1400 employees); *Schneid v. Apple Glass Co.*, 123 LRRM 2329, 2331, 1986 WL 27398, at *2 (N.D. Ill. 1986); *NLRB v. Ona Corp.*, 605 F. Supp. 874, 886 (N.D. Ala. 1985) (1 employee); *Hoffman v. Cross Sound Ferry Service, Inc.*, 109 LRRM 2884, 2888-89, 1982 WL 2016, at *6 (D. Conn. 1982) (1 employee); *Zipp v. Shenanigans*, 106 LRRM 2989, 2992, 1980 WL 2195, at *4-*5 (C.D. Ill. 1980); *Davis v. R. G. LeTourneau, Inc.*, 340 F. Supp. 882, 884 (E.D. Tex. 1971) (11 out of 2000 employees).

[4] See *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 239 (6th Cir. 2003); *Pye v. Excel Case Ready*, 238 F.3d 69, 74-75 (1st Cir. 2001); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996); *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 373 (11th Cir. 1992); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878-879, 881 (3d Cir. 1990); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454 (1st Cir. 1990); *Mattina v. Chinatown Carting Co.*, 290 F. Supp. 2d 386, 395 (S.D.N.Y. 2003*); D'Amico v. Cox Creek Refining Co.*, 719 F. Supp. 403, 408 (D. Md. 1989); *Silverman v. Whittall & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, at *1 (S.D.N.Y. 1986); *Hoffman v. Cross Sound Ferry Service, Inc.*, 109 LRRM 2884, 2888-89, 1982 WL 2016, at *6 (D. Conn. 1982); *Smith v. Old Angus, Inc.*, 82 LRRM 2930, 2936, 1972 WL 936, at *7 (D. Md. 1973), stay denied 83 LRRM 2413, 1973 WL 1129 (D. Md. 1973); *Davis v. R. G. LeTourneau, Inc.*, 340 F. Supp. 882, 884 (E.D. Tex. 1971).

These employees will have "observed that other workers who had previously attempted to exercise rights protected by the Act had been discharged and must wait for three years to have their rights vindicated."[5] Only through interim reinstatement of the alleged discriminatees will employees not fear retaliation and realize that they are free to support the Union or engage in other protected, concerted activities.[6] As some courts have stated, the willingness of employees to engage in protected activities "will be virtually impossible unless [the Employer's] employees are given an affirmative signal that further union activity will not cause the kind of retaliation that has occurred in the past."[7]

At the same time, interim reinstatement will not effectively demonstrate to employees that they can freely exercise their statutory rights if the alleged discriminatees are not returned to their pre-unfair labor practice status. Thus, it is also effective Section 10(j) relief depends on the interim rescission of discriminatory discipline, such as unlawful disciplinary warnings,[8] and the rescission of all discriminatory changes in employee working conditions.[9]

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[5] *Silverman v. Whittall & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, at *1 (S.D.N.Y. 1986). See also *Sharp v. Ashland Construction Co., Inc.*, 190 F. Supp. 2d 1164, 1170-71 (W.D. Wis. 2002) ("Few employees would retain their enthusiasm for the union after seeing their fellow employees fired or laid off when they could be working. . . .").

[6] See, e.g., *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 971 (6th Cir. 2001); *Pye v. Excel Case Ready*, 238 F.3d 69, 74-75 (1st Cir. 2001); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1135, 1136 (10th Cir. 2000); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1572-73 (7th Cir. 1996), cert. denied 519 U.S. 1055 (1997); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878-879, 881 (3d Cir. 1990); *Angle v. Sacks*, 382 F.2d 655, 660-661 (10th Cir. 1967); *Sharp v. Ashland Construction Co., Inc.*, 190 F. Supp. 2d 1164, 1170-71 (W.D. Wis. 2002); *Silverman v. Whittall & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, at *1 (S.D.N.Y. 1986).

[7] *NLRB v. Ona Corp.*, 605 F. Supp. 874, 886 (N.D. Ala. 1985). Accord *Hoffman v. Cross Sound Ferry Service, Inc.*, 109 LRRM 2884, 2888, 1982 WL 2016, at *6 (D. Conn. 1982).

[8] See, e.g., *Blyer v. Domsey Trading Corp.*, 139 LRRM 2289, 2292, 1991 WL 148513 and 1991 WL 150817, at *2 (E.D.N.Y. 1991); *Crawford v. Environmental Waste Disposal, Inc.*, 568 F. Supp. 22, 27-28 (N.D. Ill. 1983); *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1155 (D. Mass. 1983), aff'd mem. 725 F.2d 664 (1st Cir. 1983).

[9] See, e.g., *Gottfried v. Frankel*, 818 F.2d 485, 494-495 (6th Cir. 1987); *D'Amico v. United States Service Industries, Inc.*, 867 F. Supp. 1075, 1096, 1102 (D. D.C. 1994) ("no talking" rule enjoined); *Bordone v. Talsol Corp.*, 799 F. Supp. 796, 801-802 (S.D. Ohio 1992); *Allen v. Yellow Cab Cooperative, Inc.*, 101 LRRM 2593, 1979 WL 15490 (N.D. Cal. 1979) (interim relief granted to enjoin employer's imposition of more onerous working conditions upon employees because of union organizing campaign).

2. Section 8(a)(4)

An employer's discharge **[or demotion, transfer, etc. . .]** of employees in retaliation for their having **[invoked or participated in]** the Board's administrative process threatens irreparable harm to that process and to the employees' exercise of statutory rights. The Board's administrative process is not self-enforcing and to be activated, depends on the ability of employees and other persons with knowledge of the facts in a dispute covered by the NLRA to have complete and unrestricted access to file unfair labor practice charges and give testimony before the Board.[10] Moreover, that access must be protected in a timely fashion because the statute of limitations set forth in the Act requires that a charge be filed within six months of an alleged unfair labor practice.[11] Because a final Board order remedying retaliation for participation in Board processes likely will not issue until after the six-month statute of limitations expires, an employer's unfair labor practices that deter employees from accessing the Board's administrative process are likely to disrupt the Board's ability to hear and decide unfair labor practice allegations. Indeed, not only may employees refuse to cooperate in Board investigations by not providing affidavits or testimony, out of fear of retaliation they may decline to file charges altogether.[12] As a result, employees will be irreparably deprived of their statutory rights. Such harm appropriately may be prevented by a Section 10(j) injunction.[13]

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[10] See *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972); *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967); *Operating Engineers Local 138 (Charles S. Skura)*, 148 NLRB 679, 681 (1964); *Better Monkey Grip Co.*, 115 NLRB 1170, 1171 (1956) (discharge of supervisor for testimony in Board proceeding), enf'd 243 F.2d 836 (5th Cir.), cert. denied 353 U.S. 864, rehg. denied 355 U.S. 900 (1957).

[11] 29 U.S.C. § 160(b). See also *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416-417 (1960).

[12] Cf. *NLRB v. Senftner Volkswagen Corp.*, 681 F.2d 557, 560 (8th Cir. 1982) (employer withdrew job offer to employee after union filed unfair labor practice charge on employee's behalf).

[13] See *Humphrey v. United Credit Bureau of America*, 99 LRRM 3459, 3461, 1978 WL 1668, at *3 (D. Md. 1978) (temporary injunction granted against active prosecution of employer state lawsuit filed against employee, which alleged that employee provoked her discharge so that she could file Board charges; "the potential exposure of other employees to similar lawsuits would adversely affect the exercise by them of their rights under" the Act); *Wilson v. Whitehall Packing Co.*, 108 LRRM 2165, 2167, 1980 WL 18761 (W.D. Wis. 1980) (enjoining state court suit filed in retaliation for union's filing charge with Board).

APPENDIX G

B. Interim Reinstatement Is Necessary to Restore Union Activists to the Unit and/or Prevent Scattering of Alleged Discriminatees So Final Board Order Is Not Meaningless

It is well established that discriminatees are less likely to accept reinstatement offers when a significant amount of time has passed between their alleged unlawful discharge and the date of the reinstatement offer.[14] Without an interim reinstatement order, there is the potential that a final Board reinstatement order will be meaningless because the leading union adherents will find work elsewhere and will not return to this unit. As a result, the employer will effectively have accomplished its unlawful goal of permanently ridding its workplace of union supporters. Interim reinstatement is therefore crucial to protect those employees most active in supporting the union **[and to safeguard the parties' collective-bargaining process]**.[15] Furthermore, the recalled discriminatees are less likely to support their union after reinstatement if they were required to wait a long period of time for reinstatement.[16] Thus, absent a prompt interim reinstatement of

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[14] See *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 299 (7th Cir. 2001); *Pye v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996); *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 749 (9th Cir. 1988); *Asseo v. Bultman Enterprises, Inc.*, 913 F. Supp. 89, 97 (D. P.R. 1995); *Blyer v. Domsey Trading Corp.*, 139 LRRM 2289, 2291, 1991 WL 148513, at *3 and 1991 WL 150817 (E.D.N.Y. 1991); *Pascarell v. Orit Corp./Sea Jet Trucking*, 705 F. Supp. 200, 204 (D. N.J. 1988), aff'd mem. 866 F.2d 1412 (3d Cir. 1988); *Silverman v. Reinauer Transportation*, 130 LRRM 2505, 2508, 1988 WL 159172, at *4 (S.D.N.Y. 1988), aff'd mem. 880 F.2d 1319 (2d Cir. June 23, 1989); *Zipp v. Bohn Heat Transfer Group*, 110 LRRM 3013, 3015, 1982 WL 2072, at *3 (C.D. Ill. 1982); *Elliott v. Dubois Chemicals, Inc.*, 201 F. Supp. 1, 3 (N.D. Tex. 1962). See generally Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1792-93 (1983) (studies show significant decline in proportion of discriminatees accepting reinstatement when offered more than six months after discriminatory act), cited with approval in *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1094 & n.32 (3d Cir. 1984); Gaines, *The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases*, 56 Ind. L. J. 515, 517 n.13 (1981).

[15] See, e.g., *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 971 (6th Cir. 2001) ("the absence of the only union organizer at the company for an extended period of time could irreparably harm the union's chan[c]es of organizing the employees"). See also *Barker v. Industrial Hard Chrome, Ltd.*, 2007 WL 1771515 (7th Cir. 2007), granting injunction pending appeal in 181 LRRM 2313, 2007 WL 163204, at *13 (N.D. Ill. 2007), where the district court had rejected, among other things, the Board's "scatter" argument in denying interim reinstatement to 20 workers who had walked off the job in protest of treatment by their supervisor.

[16] See *Asseo v. Bultman Enterprises, Inc.*, 913 F. Supp. 89, 97 (D. P.R. 1995); *Wilson v. Liberty Homes, Inc.*, 500 F. Supp. 1120, 1129 (W.D. Wis. 1980), aff'd in relevant part 108 LRRM 2699, 2708, 1981 WL 17037, at *12-*13 (7th Cir. 1981), vacated as moot

these key union activists, the unit will likely be deprived of the Union's most articulate and committed supporters. As a result, the union's organizational drive is likely to be permanently stifled[17] **[and the union's status as bargaining representative undermined.[18]] [Where, as here, the discrimination takes place during collective bargaining, interim reinstatement of the union's core proponents is particularly important to restore the Union's sources of communication to and from the bargaining unit and to assure that the Union's support for positions it takes at the bargaining table is not inhibited by the absence of the employee leaders from the unit.]**

Similar reasoning justifies interim reinstatement when an employer has engaged in mass discrimination against the entire unit in order to undermine support for a union.[19]

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and remanded to dissolve injunction 673 F.2d 1333 (7th Cir. 1981) (unpublished order), opinion withdrawn from publication as moot 109 LRRM 2492, 1982 WL 31231 (7th Cir. 1982). See generally Chaney, *The Reinstatement Remedy Revisited*, 32 Labor L.J. 357, 363 (1981).

[17] See *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 971 (6th Cir. 2001); *Pye v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1135, 1136 (10th Cir. 2000); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996); *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 749 (9th Cir. 1988); *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967) ("[t]here may be no effective union spokesman at the plant"). Accord *NLRB v. Longhorn Transfer Service, Inc.*, 346 F.2d 1003, 1006 (5th Cir. 1965) (discrimination against leading union adherents a principal weapon used to injure irreparably a union's status in a plant).

[18] See *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 370, 373-374 (11th Cir. 1992) (discrimination against union activists and stewards including "lodestars" of the campaign); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878-879 (3d Cir. 1990) (discrimination against members of union bargaining committee); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454 (1st Cir. 1990) (discriminatory refusal by successor employer to hire predecessor employer's chief union steward); *Gottfried v. Frankel*, 818 F.2d 485, 495-496 (6th Cir. 1987) (discrimination against union stewards); *Eisenberg v. Wellington Hall Nursing Home*, 651 F.2d 902, 907 (3d Cir. 1981) (discrimination against members of union bargaining committee); *Pascarell v. Orit Corp.*, 705 F. Supp. 200, 203-204 (D. N.J. 1988), aff'd mem. 866 F.2d 1412 (3d Cir. 1988) (refusal to properly reinstate unfair labor practice strikers, including union officers).

[19] See, e.g., *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 164 (1st Cir. 1995), aff'g. 876 F. Supp. 1350, 1370-71 (D. P.R. 1995), stay denied 879 F. Supp. 165 (D. P.R. 1995) (ordering reinstatement of unlawfully locked out employees); *Pascarell v. Gitano Group, Inc.*, 730 F. Supp. 616, 624 (D. N.J. 1990); *Asseo v. El Mundo Corp.*, 706 F. Supp. 116, 128-129 (D. P.R. 1989); *Silverman v. Imperia Foods, Inc.*, 646 F. Supp. 393, 400 (S.D.N.Y. 1986); *Reynolds v. Curley Printing Co.*, 247 F. Supp. 317, 323-324 (M.D.

C. Interim Reinstatement of Strikers

Interim reinstatement of the **[current[20] or]** former strikers is "just and proper" to assure that the bargaining unit remains comprised of the union's core supporters during this labor dispute.[21] As a result of the employer's unlawful refusal to reinstate the former strikers, the current number of union supporters in the employer's facility is **[minimal/reduced]**. Absent immediate reinstatement, there is a danger that employees will accept jobs elsewhere and be unavailable for reinstatement when the Board order issues.[22] Further, reinstatement will assure employees that they may fully exercise their right to exert legitimate economic pressure on their employer now or in the future during this labor dispute without fear of unlawfully being **[denied reinstatement/discharged]**.[23]

Tenn. 1965) (mass interim reinstatement of unit employees warranted to protect incumbent unions and parties' collective-bargaining process).

[20] **[This argument supports interim reinstatement for unfair labor practice strikers denied reinstatement after an unconditional offer to return to work, see *NLRB v. Mastro Plastics*, 350 U.S. 270 (1956), or for an order directing an employer to offer immediate reinstatement upon the ULP striker's offer to return, see *D'Armigene, Inc.*, 148 NLRB 2, 3 (1964). It also supports interim reinstatement of economic strikers who have either been denied reinstatement or discharged in violation of their *Laidlaw* rights. See *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970)).]**

[21] See *Calatrello v. NSA, Div. of Southwire,* 164 LRRM 2500, 2503, 2000 WL 767008 (W.D. Ky. 2000) (reinstatement of strikers to provide support and strength to newly certified union); *Kobell v. Beverly Health & Rehabilitation Services, Inc.*, 987 F. Supp. 409, 416, 417 (W.D. Pa. 1997) (reinstatement of strikers necessary to restore union's communication network), aff'd mem. 142 F.3d 428 (3d Cir. 1998), cert. denied 525 U.S. 1121 (1999). See generally *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 373 (11th Cir. 1992) (discharge of union stewards during bargaining); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 881 (3d Cir. 1990) (interim reinstatement of most active union supporters on union negotiating committee); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454 (1st Cir. 1990) (discriminatory refusal by successor employer to hire predecessor employer's chief union steward); *Eisenberg v. Wellington Hall Nursing Home*, 651 F.2d 902, 907 (3d Cir. 1981).

[22] See, e.g., *Silverman v. Reinauer Transportation Cos.*, 130 LRRM 2505, 2508, 1988 WL 159172, at *4, *5 (S.D.N.Y. 1988) (ordering interim reinstate of 1000 unfair labor practice strikers upon their unconditional offer to return), aff'd mem. 880 F.2d 1319 (2d Cir. 1989). **[Also use argument, authorities, and cases cited at footnotes 14, 16, 16, above, and accompanying text.]**

[23] See, e.g., *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 164 (1st Cir. 1995), aff'g 876 F. Supp. 1350, 1370-71 (D. P.R. 1995), stay denied 879 F. Supp. 165 (D. P.R. 1995) (reinstatement of entire unit which had been unlawfully locked out by employer

Accordingly, an order requiring the employer to immediately reinstate the strikers to their former positions **[or requiring the employer to reinstate the strikers immediately upon their unconditional offer to return to work]** is clearly just and proper to safeguard the **[union's organizational campaign[24] or the parties' collective-bargaining process.[25]]** Moreover, the interim recall of the strikers would bring an end to the sort of industrial strife that Section 10(j) injunctive relief was designed to prevent.[26]

[Add arguments in support of displacement of newly hired employees, discussed below at section D.]

[Regions should be aware of the decision in *Schaub v. Detroit Newspaper Agency*, 984 F. Supp. 1048 (E.D. Mich. 1997), aff'd 154 F.3d 276 (6th Cir. 1998).

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appropriate to avoid erosion of support for union). **[Also use argument and cases cited at footnotes 1, 2, 4, above, and accompanying text.]**

[24] See, e.g., *Blyer v. Domsey Trading Corp.*, 139 LRRM 2289, 2291, 1991 WL 148513, at *3 and 1991 WL 150817 (E.D.N.Y. 1991) (E.D.N.Y. 1991) (reinstating 200 ULP strikers upon their unconditional offer to return to work during organizational campaign).

[25] See *Calatrello v. NSA, Div. of Southwire*, 164 LRRM 2500, 2503, 2000 WL 767008 (W.D. Ky. 2000) (reinstatement of over 500 unfair labor practice strikers); *Aguayo v. South Coast Refuse Corp.*, 161 LRRM 2867, 1999 WL 547861 (C.D. Cal. 1999); *Kobell v. Beverly Health & Rehabilitation Services, Inc.*, 987 F. Supp. 409, 416, 417 (W.D. Pa. 1997) (reinstatement of strikers necessary to restore union's communication network), aff'd mem. 142 F.3d 428 (3d Cir. 1998), cert. denied 525 U.S. 1121 (1999); *Pascarell v. Orit Corp.*, 705 F. Supp. 200, 203-204 (D. N.J. 1988), aff'd mem. 866 F.2d 1412 (3d Cir. 1988) (ordering both interim reinstatement of unfair labor practice strikers who were unlawfully denied employment after their offer to return to work and displacement, if necessary, of subsequently hired replacements); *Berkowitz v. Galvanizers, Inc.*, 105 LRRM 3447, 1980 WL 18725 (N.D. Cal. 1980) (reinstating ULP strikers); *Leventhal v. Car-Riv Corp.*, 96 LRRM 2899, 2901-02, 1977 WL 1793, at *3 (E.D. Pa. 1977) (reinstating 115 ULP strikers). Cf. *Rivera-Vega v. ConAgra, Inc.*, 876 F. Supp. 1350, 1370-71 (D. P.R. 1995) (reinstatement of entire unit which had been unlawfully locked out by employer), stay denied 879 F. Supp. 165 (D. P.R. 1995), aff'd 70 F.3d 153, 164 (1st Cir. 1995).

[26] See, e.g., *Rivera-Vega v. ConAgra, Inc.*, 876 F. Supp. 1350, 1370-71 (D. P.R. 1995), stay denied 879 F. Supp. 165 (D. P.R. 1995), aff'd 70 F.3d 153, 164 (1st Cir. 1995) (reinstatement of entire unit which had been unlawfully locked out by employer); *Silverman v. Reinauer Transportation Cos.*, 130 LRRM 2505, 2508, 1988 WL 159172, at *4, *5 (S.D.N.Y. 1988) (reinstate 1000 ULP strikers upon their unconditional offer to return), aff'd mem. 880 F.2d 1319 (2d Cir. 1989). See generally *DeProspero v. House of the Good Samaritan*, 474 F. Supp. 552, 559 (N.D.N.Y. 1978); *LeBus v. Manning, Maxwell & Moore, Inc.*, 218 F. Supp. 702, 705-706 (W.D. La. 1963) (interim bargaining orders "just and proper" to prevent unwarranted labor unrest).

That case involved the employer's denial of reinstatement to alleged ULP strikers in the context of a long term collective-bargaining relationship and where the parties were still engaged in bargaining. The courts were not convinced that interim relief was necessary in that case to protect the parties' collective-bargaining process. *Detroit Newspaper* should be distinguished, when applicable, where the union is organizing, is newly certified, or, in the event of a long-term collective-bargaining relationship, if the employer has withdrawn recognition.]

D. Displacement of Newly Hired Workers; Preferential Hiring List

1. Displacement and Preferential Hiring Lists Are Just and Proper

It is well settled in Section 10(j) jurisprudence that the Section 7 rights of alleged discriminatees to interim reinstatement to their former positions outweighs the mere job rights of the workers hired or reassigned to replace them.[27] Thus, there is no merit to any argument by the Employer that it would be unduly burdened by an interim reinstatement order because it would have to displace some of its current employees. Moreover, in the event that, even with displacement, the employer has insufficient positions at the time the Section 10(j) order is entered, it is also appropriate to direct the employer to establish a preferential hiring list of all the alleged discriminatees who cannot immediately be reinstated or hired. Under this provision the employer would be required to fill any new unit job openings that may occur exclusively from the preferential hiring list on a nondiscriminatory basis.[28]

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[27] See *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 299-300 (7th Cir. 2001); *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988); *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 959 (1st Cir. 1983); *Blyer v. P & W Electric, Inc.*, 141 F. Supp. 2d 326, 331 (E.D.N.Y. 2001); *Calatrello v. NSA, Div. of Southwire Co.*, 164 LRRM 2500, 2502-03, 2000 WL 767008 (W.D. Ky. 2000); *Asseo v. Bultman Enterprises, Inc.*, 913 F. Supp. 89, 97 (D. P.R. 1995); *Gottfried v. Purity Systems, Inc.*, 707 F. Supp. 296, 302 (W.D. Mich. 1988); *Taylor v. Circo Resorts, Inc.*, 458 F. Supp. 152, 156 (D. Nev. 1978); *Smith v. Old Angus, Inc.*, 82 LRRM 2930, 2937, 1972 WL 936, at *9 (D. Md. 1973), stay denied 83 LRRM 2413, 1973 WL 1129 (D. Md. 1973); *Douds v. American Coal Shipping, Inc.*, 39 LRRM 2767, 2769-70 (S.D.N.Y. 1957). Cf. *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 n.3 (6th Cir. 1988) (dictum); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1092-93 (3d Cir. 1984) (reinstatement denied on other grounds).

[28] See, e.g., *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1133, 1137 (10th Cir. 2000); *Blyer v. Domsey Trading Corp.*, 139 LRRM 2289, 2292, 1991 WL 148513 and 1991 WL 150817, at *2 (E.D.N.Y. 1991); *Kobell v. Menard Fiberglass Products, Inc.*, 678 F. Supp. 1155, 1168-69 (W.D. Pa. 1988). Cf. *Darlington Mfg. Co. v. NLRB*, 397 F.2d 760, 773 (4th Cir. 1968), cert. denied 393 U.S. 1023 (1969); *Lexington Electric Products Co., Inc.*, 124 NLRB 1400, 1401-03 (1959), enf'd as modified 283 F.2d 54 (3d Cir. 1960), cert. denied 365 U.S. 845 (1961).

2. Distinguishing Adverse Authority Concerning Displacement

[If a Respondent or a court suggests that reinstatement would not be just and proper based on precedent that denied interim reinstatement because it would require the displacement of current employees,[29] the following arguments can be asserted to counter that authority.] These decisions are against the great weight of Section 10(j) precedent[30] and are easily distinguishable from the instant case.[31] For instance, unlike in *Fabsteel*, this case does not involve a successor employer with no previous employment relationship with the discharged discriminatees.[32] Furthermore, unlike in *Air Express International*, the Employer here has a relatively large workforce. Thus, it should not be burdensome for the Employer to shift personnel in order to reinstate **[number]** discriminatees to a unit workforce of approximately **[number]**.[33]

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[29] See *Johnson v. Sunshine Piping, Inc.*, 238 F. Supp. 2d 1297, 1304 (N.D. Fla. 2002); *Clements v. Alan Ritchey, Inc.*, 165 F. Supp. 2d 1068, 1082 (N.D. Cal. 2001); *Mack v. Air Express International*, 471 F. Supp. 1119, 1125 (N.D. Ga. 1979) (denying reinstatement when operation was fully staffed and reinstatement would mean discharge of five "innocent bystanders"); *Crain v. Fabsteel Co.*, 427 F. Supp. 316, 318 (W.D. La. 1977) (court declined to reinstate 30 employees fired by predecessor company, where reinstatement would require successor to displace its employees in favor of employees with whom it never had an employment relationship); *Johansen v. Queen Mary Restaurants Corp.*, 86 LRRM 2813, 2814, 1974 WL 1120, at *2 (C.D. Cal. 1974), vacated as moot 522 F.2d 6, 7 (9th Cir. 1975). We note, however, that the language of the two California district courts in *Alan Ritchey* and *Queen Mary Restaurants* is inconsistent with the Ninth Circuit's contrary holding in *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988). Moreover, the district court decision in Queen *Mary Restaurants* was vacated as moot.

[30] See cases cited in footnote 27, above.

[31] **[Use appropriate distinguishing features discussed infra.]**

[32] **[If successor case, use cases cited in footnote 43, below.]**

[33] See *D'Amico v. United States Service Industries, Inc.*, 867 F. Supp. 1075, 1092 (D. D.C. 1994) (not burdensome to order employer to reinstate 10 alleged discriminatees to workforce of 1400 employees); *Smith v. Old Angus, Inc.*, 82 LRRM 2930, 2935, 2937 1972 WL 936, at *6, *9 (D. Md. 1973) (order reinstating a "substantial number" of discriminatees to a workforce of at least 50), stay denied 83 LRRM 2413, 1973 WL 1129 (D. Md. 1973); *Davis v. R. G. LeTourneau, Inc.*, 340 F. Supp. 882, 884 (E.D. Tex. 1971) (order reinstating 11 discriminatees to workforce of 2000).

E. Offer of Interim Reinstatement Remains Appropriate Even Though Discriminatee Has Declined Prior Offer by Employer or Has Otherwise Indicated that Reinstatement Would Not be Accepted

Notwithstanding that **[name of discriminatee]** has indicated that he [**she**] does not wish to return to his **[her]** former employment, a judicially mandated offer of interim reinstatement is nevertheless appropriate to ameliorate the harm caused by the unfair labor practices to the union's status. Thus, requiring the employer to make **[an]** offer**[s]** of interim reinstatement will send an affirmative and reassuring message to all of the remaining employees that they are free to support the union without fear of further discrimination.[34] Further, despite **[name of discriminatee]** current inclination not to return to the employer's workforce, those circumstances may change by the time the district court grants an interim remedy. An interim reinstatement order will ensure that **[name of discriminatee]** is not foreclosed from the opportunity to return to his **[her]** position with the employer if he **[she]** changes his **[her]** mind by the time of the district court's decision. Moreover, the discriminatee**[s]** is **[are]** entitled to consider an offer of reinstatement under the protections of a Section 10(j) order **[, which includes an interim bargaining order in favor of the union]**.[35]

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[34] See *NLRB v. Ona Corp.*, 605 F. Supp. 874, 886 (N.D. Ala. 1985); *Hoffman v. Cross Sound Ferry Service, Inc.*, 109 LRRM 2884, 2888-89, 1982 WL 2016, at *6 (D. Conn. 1982). Accord *Pye v. Excel Case Ready*, 238 F.3d 69, 74-75 (1st Cir. 2001); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1135, 1136 (10th Cir. 2000); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878-879, 881 (3d Cir. 1990); *Angle v. Sacks*, 382 F.2d 655, 660-661 (10th Cir. 1967); *Sharp v. Ashland Construction Co., Inc.*, 190 F. Supp. 2d 1164, 1170-71 (W.D. Wis. 2002); *Silverman v. Whittall & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, at *1 (S.D.N.Y. 1986); *Smith v. Old Angus, Inc.*, 82 LRRM 2930, 2936, 1972 WL 936, at *7 (D. Md. 1973), stay denied 83 LRRM 2413, 1973 WL 1129 (D. Md. 1973); *Davis v. R. G. LeTourneau, Inc.*, 340 F. Supp. 882, 884 (E.D. Tex. 1971). See generally *Heinrich Motors v. NLRB*, 403 F.2d 145, 150 (2d Cir. 1968) (offer of reinstatement has dual purpose of protecting discharged employee and demonstrating good faith of employer to other employees).

[35] See *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1166 (E.D. Mich. 1979) (court ordered interim reinstatement to alleged discriminatees even though employer contended that it had already offered recall; "When a company's action creates an atmosphere inhospitable to union adherents they may be reluctant to once again subject themselves to those conditions."), aff'd mem. 615 F.2d 1360 (6th Cir. 1980). See generally *Sharp v. Ashland Construction Co., Inc.*, 190 F. Supp. 2d 1164, 1170-71, 1173 (W.D. Wis. 2002) (granting interim reinstatement along with interim *Gissel* bargaining order).

APPENDIX G

F. Reinstatement to Construction Industry/Temporary Jobsites

[In some cases, most often in the construction industry, discriminatees have been discharged from, or denied hire to, short term jobs which have been, or are about to be, completed by the time interim reinstatement is sought. In such cases, the Region can use the following arguments to explain why interim reinstatement to another jobsite is appropriate.]

The fact that the jobsite at issue here is of short duration does not preclude an interim reinstatement remedy under Section 10(j) where such relief is otherwise warranted. Under established Board law discriminatees in the construction industry are presumptively entitled to reinstatement to available positions at *future* jobsites.[36] This presumption is rebutted only by evidence that the discriminatee would not have been transferred or reassigned to another project upon the completion of the job from which s/he was unlawfully discharged.[37] However, in this case the Employer will not be able to make such a showing. Instead, the evidence indicates that **[(1) the Company has previously moved employees among its jobsites; (2) the discriminatees were never informed by the employer that they were being hired *only* for one particular jobsite; and/or (3) the employer is currently working at other jobsites and has offered no legitimate basis for concluding that the discriminatees would not have been offered positions on those jobsites when the jobs at which they would have been working concluded.]** In these circumstances, the principles set forth in *Dean General Contractors* apply, and a district court under Section 10(j) can grant the same reinstatement relief on an interim basis that the Board will order in due course.[38] Thus, an interim reinstatement order covering both present and future jobsites should be granted herein.

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[36] *Dean General Contractors*, 285 NLRB 573, 574 (1987) (holding that reinstatement is presumptive remedy, subject to employer's presenting rebutting evidence in compliance proceeding, and overruling prior cases holding that in construction industry reinstatement was presumptively not available because of limited duration of most jobs and likelihood that jobsite at issue would not be in existence at the time of the Board's final remedial order). Accord *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291 (6th Cir. 1998).

[37] *Dean General Contractors*, 285 NLRB 573, 575 (1987). See also *Laben Electric Co.*, 323 NLRB 428, 428 (1997); *Casey Electric*, 313 NLRB 774, 776 (1994).

[38] See *Morio v. North American Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980).

APPENDIX G

II. RESPONSES TO POTENTIAL EMPLOYER DEFENSES

A. Defenses to "Small and Intimate Unit" Rationale for Denying Reinstatement (based on *Kobell v. Suburban Lines, Inc.* – for use in Third Circuit cases and Successor Cases)

Interim reinstatement is appropriate in the instant case notwithstanding the Third Circuit's decision in *Kobell v. Suburban Lines*.[39] In that case the circuit court affirmed the denial of 10(j) "reinstatement" relief against a successor employer that had discriminatorily refused to hire its predecessor's unionized employees. The Third Circuit ruled that the district court could properly conclude that the long-term incumbent union (a "small and intimate" union) presumptively could reestablish its employee support when employees were reinstated pursuant to a final Board order.[40] This reasoning, however, is inapposite to the instant case.

The employees here did not enjoy the type of stable, long term collective-bargaining relationship that existed between the union and the employer in *Suburban Lines*. **[Add facts that distinguish the instant case from *Suburban Lines*, including: 1) the length of the collective-bargaining relationship; (2) size of the workforce; (3) particular characteristics of the workforce that do not make it "cohesive," such as high turnover, a significant anti-union contingent in the work place, large percentage of unit did not support strike; (4) particular characteristics of the workforce that make reconstitution of the unit unlikely, such as an older work force that will reach retirement age before a Board order or particular facts that make it likely employees will "scatter" before a Board order issues;[41] (5) nature of the industry involved in this case or the particular history of this employer is or has been characterized by changes in the employing entity and collective-bargaining relationship.[42]]**

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[39] 731 F.2d 1076, 1093-94 (3d Cir. 1984).

[40] Id. at 1093. The Third Circuit reaffirmed this position in *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 879 (3d Cir. 1990) (retaliation against an established small and intimate unit or improper attempts to impair that collective-bargaining relationship will have minimal chilling effect because the employees will, most likely, be fully aware of their rights under the NLRA and will resume their pre-established bargaining procedures upon the Board's finding of violation).

[41] See, e.g., *Nelson v. Valley Manufactured Housing, Inc.*, No. CY-95-3115-AAM (E.D. Wash. September 21, 1995) (given the lack of work at that time of the year in a predominantly agricultural area, absent reinstatement, the discriminatees likely would leave the area in search of work before a Board order issues) (unpublished).

[42] **[This argument is applicable to employers, e.g., in the service contracting industry, where contracts are bid for the short term and employers win and lose contracts with relative frequency, but the employee complement at the site is carried from one contractor to another.]**

[For successor cases:] Notwithstanding *Suburban Lines*, other courts have granted interim reinstatement relief against successors that have unlawfully refused to hire predecessor employees because of their union affiliation.[43]

B. Defense to Argument that Reinstatement Is Not Necessary Because There Is No Evidence Union Will Resume Campaign or Because Campaign Had Made Little Progress

[The Regions should be aware of, and prepared to distinguish, the decision in *Sharp v. Parents In Community Action, Inc.*, 172 F.3d 1034 (8th Cir. 1999). The court denied interim reinstatement there because, among other things, the union had not garnered significant support among the employees and there was no ongoing campaign.]

Sharp v. Parents In Community Action, Inc., 172 F.3d 1034 (8th Cir. 1999), is not to the contrary. There, after the discharge of a union activist, the union suspended its nascent organizing campaign when the school recessed for the summer months. The court found interim relief not just and proper in the absence of evidence that the union campaign resumed or would later resume. *Id.* at 1039-40. As opposed to the complete cessation of organizing activity in that case, the Union here **[add facts that show Union's willingness and/or interest in continuing campaign]**.

In addition, to the extent that *Parents in Community Action* suggests that interim reinstatement of a discharged union supporter is not appropriate unless the organizing campaign has reached the level of petition filing, 172 F.3d at 1039-40, it is against the weight of legal authority. See *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962 (6th Cir. 2001) (where court ordered interim reinstatement of single employee in very early stages of organizing campaign); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1135 (10th Cir. 2000); *Silverman v. Whittall & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, at *1 (S.D.N.Y. 1986) (holding interim reinstatement just and proper although organizing drive had begun only one week before discharges). As one court has noted, it would be "disingenuous to argue a lack of appreciable Union support in light of this record, which reflects the company's strenuous efforts to stifle such Union support." *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1135 (10th Cir. 2000), distinguishing *Parents in Community Action*.

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[43] See, e.g., *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 298-300 (7th Cir. 2001) (ordering interim reinstatement on successor employer that discriminatorily had refused to hire predecessor's employees); *Asseo v. Centro Medico del Turabo, Inc.*, 133 LRRM 2722, 2729 (D. P.R. 1989), aff'd 900 F.2d 445, 454 (1st Cir. 1990) (interim reinstatement of single discriminatee against successor employer); *Scott v. El Farra Enterprises, Inc.*, 863 F.2d 670, 676-677 (9th Cir. 1988) (interim reinstatement relief imposed on successor which had discriminatory plan to refuse to hire predecessor employees to avoid bargaining obligation); *Nelson v. Western Plant Services*, 152 LRRM 2633, 2636, 1996 WL 438778, at *5, *6 (W.D. Wash. 1996); *Asseo v. Bultman Enterprises, Inc.*, 913 F. Supp. 89, 97 (D. P.R. 1995); *Asseo v. El Mundo Corp.*, 706 F. Supp. 116, 128-129 (D. P.R. 1989).

Moreover, in *Parents in Community Action* the court concluded that a single discharge in a bargaining unit of approximately 230 employees was insufficient to have irreparably harmed the nascent organizing campaign. 172 F.3d at 1039-40. Here, **[add pertinent facts if there is more than a single discharge, or evidence that shows the impact if there is only a single discharge].** In any event, courts routinely have granted interim reinstatement of a single employee to **[revive the campaign/remove chill]** after an unlawful discharge. **[cite cases noted above at footnote 3]**

C. Counter-Arguments to Delay Defense

[Some courts have held that the passage of time may be "some evidence . . . that the discharges have already taken their toll on the organizational drive" and, thus, an interim reinstatement order would be no more effective than a final Board reinstatement order.[44] For general responses to delay arguments, see Appendix G-4 of this Manual, Model Responses to Claim of Board Delay in Seeking 10(j) Relief. In addition, the following arguments can be used to counter arguments that interim reinstatement would be no more effective than a Board order in due course in the specified fact patterns.]

1. Fact pattern: Unfair labor practices chilled employee support for union but some support remains

The passage of **[insert time period]** since the alleged unfair labor practices occurred is not a barrier to interim reinstatement where the discharges demonstrably have had a chilling effect on the employees' exercise of their right to support a union. **[Describe chill and adverse impact on union's campaign.]** Cf. *Boire v. Pilot Freight*, 515 F.2d 1185, 1190 (5th Cir. 1975), where the violations apparently did not the affect the union's organizing drive, as "growing numbers signed authorization cards" after the discharge of the leading union adherent and initial card signer early in the organizing campaign. Here, on the other hand, only the prompt interim reinstatement of the discriminatees can remove the "chilling impact" of the violations upon the free exercise of protected employee rights under the Act in this unit.[45] The length of time between the

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[[44] See *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975) (affirming denial of interim reinstatement of two employees discharged discriminatorily during a union organizing campaign, where three months had passed between the discharges and the filing of the 10(j) petition), rehg. and rehg. en banc denied 521 F.2d 795 (5th Cir. 1975), cert. denied 426 U.S. 934 (1976). See also *Overstreet v. El Paso Electric Co.*, 176 Fed. Appx. 607, 610-611 (5th Cir. 2006) (unpublished decision); *Solien v. Merchants Home Delivery Service, Inc.*, 557 F.2d 622, 627 (8th Cir. 1977); *Angle v. Sacks*, 382 F.2d 655, 661 (10th Cir. 1967).]

[45] See *Ahearn v. Jackson Hospital Corp.*, 351 F,3d 226, 239 (6th Cir. 2003); *Pye v. Excel Case Ready*, 238 F.3d 69, 74-75 (1st Cir. 2001); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1135, 1136 (10th Cir. 2000); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878-879, 881 (3d Cir. 1990);

violations and the Board's 10(j) petition does not, per se, demonstrate that interim relief would be no more effective than a final Board order.[46] Thus, where a chilling impact is apparent but some support for the union still exists, interim relief is appropriate to protect that support from further deterioration pending a Board order.[47]

2. Fact pattern: Union lost election, but clearly intends to continue to organize

Although the election has already been held and the union lost, this is not a case where interim relief is unnecessary because there is no ongoing organizing activity to protect.[48] Thus, the Union here does not intend to simply await the outcome of the Board's decision on directing a re-run election. Rather, **[describe evidence showing how union intends to continue to organize.]** Accordingly, interim reinstatement of the discriminatees *now* will be much more effective at eliminating the lingering chill of the Employer's past discrimination[49] and, therefore, promptly restoring the laboratory

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Angle v. Sacks, 382 F.2d 655, 660-661 (10th Cir. 1967); *Mattina v. Chinatown Carting Corp.,* 290 F. Supp. 2d 386, 394-395 (S.D.N.Y. 2003); *Sharp v. Ashland Construction Co., Inc.,* 190 F. Supp. 2d 1164, 1170-71 (W.D. Wis. 2002); *Blyer v. P & W Electric, Inc.,* 141 F. Supp. 2d 326, 330 (E.D.N.Y. 2001); *Dunbar v. Northern Lights Enterprises, Inc.,* 942 F. Supp. 138, 147 (W.D.N.Y. 1996); *Silverman v. Whittall & Shon, Inc.,* 125 LRRM 2150, 2151, 1986 WL 15735, at *1 (S.D.N.Y. 1986); *NLRB v. Ona Corp.,* 605 F. Supp. 874, 886 (N.D. Ala. 1985); *Hoffman v. Cross Sound Ferry Service, Inc.,* 109 LRRM 2884, 2888-89, 1982 WL 2016, at *6 (D. Conn. 1982); *Smith v. Old Angus, Inc.,* 82 LRRM 2930, 2936, 1972 WL 936, at *7 (D. Md. 1973), stay denied 83 LRRM 2413, 1973 WL 1129 (D. Md. 1973); *Davis v. R. G. LeTourneau, Inc.,* 340 F. Supp. 882, 884 (E.D. Tex. 1971).

[46] See *Sharp v. Webco Indus., Inc.,* 225 F.3d 1130, 1135-36 (10th Cir. 2000); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d 744, 750 (9th Cir. 1988); *Gottfried v. Frankel,* 818 F.2d 485, 495 (6th Cir. 1987); *Blyer v. P & W Electric, Inc.,* 141 F. Supp. 2d 326, 332-333 (E.D.N.Y. 2001); *Calatrello v. NSA, Div. of Southwire Co.,* 164 LRRM 2500, 2503, 2000 WL 767008 (W.D. Ky. 2000); *Dunbar v. Northern Lights Enterprises, Inc.,* 942 F. Supp. 138, 147 (W.D.N.Y. 1996).

[47] See *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 373-374 (11th Cir. 1992), where the court viewed its decision as consistent with *Pilot Freight,* which is binding precedent in the 11th Circuit. *Id.* at 369.

[48] Cf. *Sharp v. Parents In Community Action, Inc.,* 172 F.3d 1034 (8th Cir. 1999) (interim reinstatement denied because, among other things, there was no ongoing campaign); *Sharp v. La Siesta Foods, Inc.,* 859 F. Supp. 1370 (D. Kan. 1994) (10(j) relief denied where union lost election and was not engaged in any further organizing activity).

[49] See cases cited at footnote 44 above.

conditions necessary to the Union's new campaign,[50] than would a reinstatement remedy many months from now under a final Board order.[51]

3. Fact pattern: Post-election violations

That the representation election already has been held does not make interim reinstatement inappropriate.[52] It is vital here to protect the union's remaining unit employee support from further deterioration, pending the Board's final order, due to the employer's ongoing pattern of unremedied discrimination. The bulk **[a substantial proportion, some]** of the discharges the Board is litigating in this Section 10(j) proceeding occurred after the **[date]** election, as recently as **[date]**. Moreover, interim reinstatement is warranted here to protect the union's potential status as the employees' exclusive bargaining representative should the results of the election reveal that the union obtained a majority of the votes.[53]

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[50] See *General Shoe Corp.,* 77 NLRB 124, 127 (1948); *NLRB v. Houston Chronicle Publishing Co.*, 300 F.2d 273, 278 (5th Cir. 1962) ("In election proceedings, it is the function of the Board to provide 'a laboratory' in which an experiment to determine the uninhibited desires of the employees may be conducted under conditions as nearly ideal as possible.").

[51] See *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 374 (11th Cir. 1992) (interim relief warranted despite passage of time, absent conclusion that even interim relief "could not salvage" remaining union support; where 10(j) relief would better protect existing union support than Board order in due course, district court's denial of relief was abuse of discretion).

[52] Cf. *Sharp v. La Siesta Foods, Inc.,* 859 F. Supp. 1370 (D. Kan. 1994) (10(j) relief denied where election had already been held, union lost and was not engaged in any further organizing activity, pending the Board's decision on objections, and employer had committed no recent violations).

[53] See generally *Pascarell v. Vibra Screw Inc.,* 904 F.2d 874, 878-879 (3d Cir. 1990); *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 373 (11th Cir. 1992); *Asseo v. Centro Medico del Turabo, Inc.,* 133 LRRM 2722, 2729, 1989 WL 130007, at *9 (D. P.R. 1989), aff'd 900 F.2d 445, 454 (1st Cir. 1990); *Rivera-Vega v. ConAgra, Inc.,* 876 F. Supp. 1350, 1370-71 (D. P.R. 1995), stay denied 879 F. Supp. 165 (D. P.R. 1995), aff'd 70 F.3d 153, 164 (1st Cir. 1995); *Pascarell v. Gitano Group, Inc.,* 730 F. Supp. 616, 624 (D. N.J. 1990); *Silverman v. Imperia Foods, Inc.,* 646 F. Supp. 393, 400 (S.D.N.Y. 1986); *Reynolds v. Curley Printing Co.,* 247 F. Supp. 317, 323-324 (M.D. Tenn. 1965) (interim reinstatement warranted to protect incumbent unions and parties' collective-bargaining process). See generally *Moore-Duncan v. Horizon House Developmental Services,* 155 F. Supp. 2d 390, 396-397 (E.D. Pa. 2001) (without employee support, a union has little leverage and "will be hard-pressed to secure improvements in wages and benefits at the bargaining table").

D. Counter-Argument to Defense that Interim Reinstatement Order Will Prohibit or Unduly Restrict Employer's Ability to Impose Lawful Discipline

There is no merit to the employer's argument that a temporary injunction ordering affirmative reinstatement will prohibit or unduly restrict its ability to impose lawful discipline upon either the returning discriminatees or the other employees in the facility. Nothing in the proposed order limits the employer's right to impose legitimate, nondiscriminatory discipline. Indeed, the courts have recognized that 10(j) reinstatement orders do not inherently interfere with this legitimate entrepreneurial interest.[54] Further, while the existence of the injunction theoretically subjects the employer to further Agency scrutiny and possible contempt proceedings based upon its imposition of future discipline, "such a risk cannot be the talisman of 'harm' analysis. Otherwise, § 10(j) injunctive relief would never issue."[55]

[54] See *Pye v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996) ("The company always has the legal right to discipline an employee in a nondiscriminatory fashion for improper conduct."); *Eisenberg v. Wellington Hall Nursing Homes, Inc.*, 651 F.2d 902, 906 (3d Cir. 1981) ("The employer will receive the benefit of the reinstated employees' labor in the interim. If there is a serious question about the quality of any employee's future work performance he can be discharged when the question arises."); *Blyer v. P & W Electric, Inc.*, 141 F. Supp. 2d 326, 332 (E.D.N.Y. 2001).

[55] *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1573 (7th Cir. 1996).

APPENDIX G

APPENDIX G-4

MODEL RESPONSES TO CLAIM OF BOARD DELAY IN SEEKING 10(J) RELIEF

Contrary to the Respondent's contention, the passage of time since the violations initially occurred does not preclude injunctive relief in this case. The bulk of the unfair labor practices took place on **[dates]**; the complaint, a predicate to a Section 10(j) petition, issued on **[date]**; and the petition was filed on **[date]**. The time taken to process the charges and to authorize filing of the Section 10(j) petition does not indicate undue delay. See *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 248-249 (3d Cir. 1998) (fourteen-month passage of time insufficient to deny relief when otherwise warranted); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 881-882 (3d Cir. 1990) (eight-month passage of time no bar to injunction; need for injunctive relief emerged over time from pattern of violations). The Board must have time to investigate and deliberate before initiating Section 10(j) proceedings. *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 856 and n. 41 (5th Cir. 2010) (eighteen-month passage of time between refusal to reinstate and filing of 10(j) petition no bar to injunction); *Muffley v. Spartan Mining Co*., 570 F.3d 534, 539, 544-45 (4th Cir. 2009) (affirming injunctive relief after eighteen-month delay, recognizing that "[c]omplicated labor disputes like this one require time to investigate and litigate"); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000) (seven-month passage of time no bar to injunction); *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221, 1227 (6th Cir. 1993) (three-month passage of time between filing of charges and filing of 10(j) petition no bar to injunction); *Aguayo v. Tomco Carburetor*, 853 F.2d 744, 750 (9th Cir. 1988) (four-month passage of time no bar to injunction); *Maram v. Universidad Interamericana*, 722 F.2d 953, 960 (1st Cir. 1983) (four-month

passage of time no bar to injunction; the Board "cannot operate overnight"); *Reichard v. Foster Poultry Farms*, 425 F. Supp. 2d 1090, 1100-1101 (E.D. Cal. 2006) (five-month passage of time; "the suit-authorization process is lengthy").

[Add the following if waiting for the close of the ALJ hearing contributed to the delay in filing the petition] Moreover, the Regional Director prudently waited until the close of the administrative law judge hearing on **[date]** before seeking Section 10(j) authorization. This caution was well warranted, as the administrative case proceeded promptly and resulted in a record that strengthens the "reasonable cause" **["likelihood of success on the merits"]** element of the injunction case. *See Hirsch v. Konig*, 895 F. Supp. 688, 697-698 (D. N.J. 1995) (waiting for completion of ALJ hearing before filing 10(j) petition was reasonable); *Moore-Duncan v. Aldworth Co.*, 124 F.Supp. 2d 268, 293-294 (D. N.J. 2000); *Chavarry v. E.L.C. Electric, Inc.*, 2004 WL 2137644, at *8 (S.D. Ind. June 29, 2004).

[Add the following if waiting for ALJD contributed to delay in filing the petition.] The courts have routinely granted or affirmed Section 10(j) relief following the issuance of a favorable administrative law judge decision in the underlying administrative proceeding where, as here, such relief is in the public interest and can prevent further harm to employee statutory rights. *See Overstreet v. El Paso Disposal, L.P.*, 625 F.3d at 856; *Muffley v. Spartan Mining Co.*, 570 F.3d at 544; *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001); *Silverman v. J.R.L. Food Corp.*, 196 F.3d 334, 337-38 (2d Cir. 1999); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 161 (1st Cir. 1995); *Glasser v. Heartland-University of Livonia, MI, LLC*, 632 F.Supp.2d 659, 674-75 (E.D. Mich. 2009).

[Add the following if the equitable defense of laches is raised] Further, there is no evidence that the passage of time has somehow worked a significant detriment to the Respondent so that the doctrine of laches would apply here against the Board. *See NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893-894 (7th Cir. 1990); *Reichard v. Foster Poultry Farms*, 425 F. Supp. 2d 1090, 1101 (E.D. Cal. 2006). Moreover, as the wrongdoer, the Respondent should not be permitted to complain about any delay in initiating otherwise appropriate Section 10(j) proceedings. *See Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984).

More importantly, courts have recognized that delay in initiating Section 10(j) proceedings does not, per se, preclude injunctive relief. Delay is significant only if the lawful status quo cannot be restored and interim relief would be no more effective than a final Board order. *See Sharp v. Webco Indus., Inc.*, 225 F.3d at 1135-1136; *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 374 (11th Cir. 1992); *McDermott v. Ampersand Publishing, LLC*, 593 F.3d 950, 965 (9th Cir. 2010); *Gottfried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987). *Accord Boire v. Pilot Freight Carriers*, 515 F.2d 1185, 1193 (5th Cir. 1975); *Aguayo v. S & F Market Street Healthcare LLC*, 2006 WL 941183 (C.D. Cal. March 22, 2006), *aff'd* 205 Fed.Appx. 632, 634, 2006 WL 3479032 (9th Cir. 2006); *Blyer v. Pratt Towers, Inc.*, 124 F.Supp. 2d 136, 147 (E.D.N.Y. 2000). Thus, 10(j) relief remains appropriate here because the district court can restore the lawful status quo and more effectively protect statutory rights and preserve the collective-bargaining process than a Board order in due course. **[Insert factual argument to support this conclusory statement, e.g. union leader wants reinstatement or union ready and willing to bargain. Acknowledge, if appropriate, that some harm may have occurred, but in**

any event interim restoration of status quo would be more effective than a Board order in due course.]

Finally, any arguable delay by the Board in commencing 10(j) proceedings should not penalize the affected employees, who have no control over the 10(j) process. *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d at 249; *Gottfried v. Mayco Plastics*, 472 F. Supp. 1167, 1168 (E.D. Mi. 1979), *aff'd. mem.* 615 F.2d 1360 (6th Cir. 1980). *Accord Solien v. Merchants Home Delivery Service, Inc.*, 557 F.2d 622, 627 (8th Cir. 1977) (denial of 10(j) relief not appropriate to express displeasure with Board delay); *Blyer v. Pratt Towers, Inc.*, 124 F.Supp. 2d at 147 (it is inappropriate to punish employees for the Board's delay."); *Dunbar v. Carrier Corp.*, 66 F.Supp. 2d 346, 354 (N.D.N.Y. 1999)(same); *Norelli v. SFO Good-Nite Inn*, 2007 WL 662477, at *14, *15 (N.D. Cal. March 1, 2007); *Moore-Duncan v. Laneko Engineering Co., Inc.*, 2003 WL 23139070 at *3 (E.D. Pa. Dec. 23, 2003); *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1156 (D. Mass. 1983), *aff'd. per curiam* 725 F.2d 664 (1st Cir. 1983).

APPENDIX G

APPENDIX G-5

ARGUMENT TO SUPPORT USE OF HEARSAY EVIDENCE IN SECTION 10(J) PROCEEDINGS

The district court may properly admit hearsay testimony in Section 10(j) proceedings. In *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), the Supreme Court stated a relaxed evidentiary standard for preliminary injunction hearings:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and *evidence that is less complete than in a trial on the merits*. A party thus is not required to prove his case in full at a preliminary-injunction hearing. (Emphasis added)

Other courts have acknowledged that hearsay evidence is admissible in preliminary injunction proceedings. *Kos Pharm v. Andrx Corp.*, 369 F.3d 700, 718-720 (3d Cir. 2004)*; Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *Sierra Club, Lone Star Chaper v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993); *Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (court may give otherwise inadmissible evidence weight in preliminary injunction proceeding when to do so will prevent irreparable harm). See also *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) ("Federal Rules of Evidence do not apply to preliminary injunction hearings"). This principle is equally applicable to Section 10(j) proceedings. *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986).

APPENDIX G

Section 10(j) injunctions fall within the rule of *Camenisch* because Section 10(j) injunctions are intended to preserve or restore the status quo until the Board has an opportunity to determine the merits of the underlying unfair labor practice. *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38, (2d Cir. 1975). The status quo to be maintained is that which existed prior to the onset of the unlawful conduct, i.e. **[add status quo facts of case]**. *Id.*

In addition, the nature of the Section 10(j) proceeding further supports the use of hearsay evidence. A Section 10(j) proceeding is not a full trial on the merits of the underlying unfair labor practice. Thus, the district court should give the Regional Director the benefit of the doubt on factual matters *(Seeler v. Trading Port*, 517 F.2d at 37), and refrain from weighing the credibility of witnesses (see e.g., *Scott v. Stephen Dunn & Associates*, 241 F.3d 652, 662 (9th Cir. 2001); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 287 (7th Cir. 2001); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570 (6th Cir. 1996), cert. denied 519 U.S. 1055 (1997); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051-1052, n. 5 (2d Cir. 1980); *Fuchs v. Jet Spray Corp.*, 560 F.Supp. 1147, 1150-51, n. 2 (D.Mass. 1983), affd per curiam 725 F.2d 664 (1st Cir. 1983)). Because the Regional Director is not required to prove the violation, but rather "reasonable cause to believe" that the alleged violation has occurred, **[in 1st, 4th, 7th, 8th and 9th Circuits, some "likelihood of success" before the Board,]** the district court is not the finder of fact who must believe or disbelieve testimony. Therefore, the quantum of evidence required to support a Section 10(j) injunction is less than that required for a full trial on the merits.

In short, the weight of authority and the purpose and nature of the Section 10(j) proceeding compel the conclusion that hearsay testimony may be properly admitted into evidence in this case.

[If the hearsay objection goes to testimony of a witness or witnesses who testify about other employees' statements that they feared retaliation from the Respondent, add the following argument:]

In addition, testimony that other employees stated they feared retaliation from the Respondent for engaging in protected activities is admissible under Federal Rules of Evidence, Rule 803(3), as an exception to the hearsay rules, to show the declarant's existing state of mind. *Lightner v. Dauman Pallet, Inc.*, 823 F.Supp. 249, 252, n. 2, 143 LRRM 2750 (D.N.J. 1992), affd. 993 F.2d 877 (3d Cir. 1993), citing *United States v. Kelly*, 722 F.2d 873 (1st Cir. 1983); *Lineback v. Spurlino Materials, LLC*, 2007 WL 3334786 at *9, n. 5, 183 LRRM 2001 (2007), affd. 546 F.3d 491 (7th Cir. 2008); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979); *Oneonta Dress Co. v. NLRB*, 333 F.2d 1 (2d Cir. 1964). Such statements of fear are admissible regardless of whether the declarant employees are available to testify. *Detroit Police Officers v. Young*, 608 F.2d at 694. Fear of retaliation is highly relevant to the propriety of injunctive relief. *Lightner v. Dauman Pallet*, 823 F.Supp. at 252, n. 2. [1]

Be aware that there are cases to the effect that testimony regarding events or beliefs that caused the declarant's state of mind is hearsay.[2] The Region should be

[1] This testimony is *not* offered to prove the alleged unfair labor practices which produced the fear. *Lightner v. Dauman Pallet*, 823 F. Supp. at 252 n. 2.

[2] *Marshall v. Commonwealth Aquarium*, 611 F.2d 1, 4-5 (lst Cir. 1979) (hearsay statement may not serve as the basis for an inference of the happening of the event which produced the state of mind); *U.S. v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980), reh'g denied 636 F.2d 315 (5th Cir. 1981). See, also *U.S. v. Emmert*, 829 F.2d 805, 809-810 (9th Cir. 1987).

prepared to argue that courts have inferred that unfair labor practices cause erosion of union support and that the causation of an employee's state of mind is a legal inference, not an evidentiary matter. An inference may be drawn from this state of mind that, if corroborated by additional evidence, may properly support an injunction.[3]

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[3] *Hirsch v. Corban Corp., Inc.*, 949 F. Supp. 296 (E.D. Pa. 1996), citing *Lightner v. Dauman Pallet, Inc.*, 823 F.Supp. 249, 252, n. 2.

APPENDIX G

APPENDIX G-6

MODEL ARGUMENT IN SECTION 10(j) NIP-IN-THE BUD CASES

I. The terminations threaten irreparable harm to the public interest, the statutory rights of employees, and the Board's remedial authority.

Immediate interim reinstatement of the illegally fired employees is just and proper. If the lawful status quo is not fully restored in a timely manner, _____ actions will inflict irreparable harm to the national labor policy encouraging collective bargaining embodied in § 1 of the Act (29 U.S.C. § 151), the employees' right to organize under § 7 of the Act (29 U.S.C. § 157), and the Board's remedial powers.

Congress has declared that "encouraging the practice and procedure of collective bargaining" is "the policy of the United States… ." 29 U.S.C. § 151. Employees have the right to decide whether they wish "to bargain collectively through representatives of their own choosing… ." 29 U.S.C. § 157. A "likelihood of success as to a § 8(a) (3) violation with regard to union activists that occurred during … an organizing drive largely establishes likely irreparable harm… ." , 650 F.3d 1334, 1363 (9th Cir. 2011).

In this case, the organizational effort is in jeopardy unless the illegally fired employees are immediately reinstated. The continued exclusion of the activists from the workplace sends an inescapable message to _____'s remaining employees: engaging in organizing activity will cost them their jobs and neither the Board nor the Union can provide a timely remedy. , 238 F.3d 69, 75 (1st Cir. 2001) (ordering interim reinstatement of five employees and noting that "the fear of employer retaliation after the firing of union supporters is exactly the 'irreparable harm' contemplated by § 10(j)").

The remaining employees, especially those who were undecided about organizing, will not participate in the campaign or support the Union after seeing what happened to the outspoken supporters. , 238 F.3d at 74-75, 76 ("discharge of active and open union supporters ... risks a serious adverse impact on employee interest in unionization");, 250 F.3d 962, 971 (6th Cir. 2001) (interim reinstatement under § 10(j) held just and proper);, 225 F.3d 1130, 1135 (10th Cir. 2000) (interim reinstatement of six union supporters held just and proper). Further, the absence of the activists creates a void in leadership for the campaign. , 238 F.3d at 75 ("absence of key union organizers can contribute to the erosion of support for a nascent union movement").

Indeed, the illegal discharges are already having a chilling effect on the organizing campaign. {describe chill evidence}

The harm to the organizational effort will not be remedied when the Board issues its final order requiring _____ to reinstate the activists. That order will come years after the discharges–too late to erase their chilling effect and revive the campaign. , 238 F.3d at 75 ("a long time may pass before the Board decides the merits of this case … the disappearance of the 'spark to unionize' may be an irreparable injury for the purposes of § 10(j)"); , 853 F.2d 744, 749-751 (9th Cir. 1988) (interim reinstatement of 11 fired members of organizing committee just and proper under § 10(j));, 83 F.3d 1559, 1573 (7th Cir. 1996). By that time, the employees will have observed that workers who "attempted to exercise rights protected by the Act had been discharged" and waited for "years to have their rights vindicated." , 125 LRRM 2150, 2151, 1986 WL 15735, *1 (S.D.N.Y. 1986) (interim reinstatement of six union activists held just and proper). No worker "in his right mind" will "participate in a union campaign… ." In fact, by that point, the activists will likely have moved on to other jobs and will not accept reinstatement. The fact that these original activists "will likely never return to work if

interim relief is not granted may itself cause irreparable injury to the unionization effort… ." , 238 F.3d at 75. The Board's order will be an "empty formality." , 382 F.2d 655, 660 (10th Cir. 1967) (ordering interim reinstatement of fired employee organizers under § 10(j)). _____, by violating the Act, will have prevented the employees from exercising their § 7 right to freely decide whether to be represented by the Union. , 238 F.3d at 75 ("Section 10(j) interim relief is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining").

Immediately reinstating the illegally fired employees offers the best chance of avoiding this unjust result. Interim reinstatement will remove the chilling effect from the organizing campaign and fill the leadership void. , 382 F.2d at 660-661 (when the Board finally acts, "the employees then at the plant may not wish to exercise the rights thus secured to them. … [interim] [r]einstatement of the illegally discharged employees is the best visible means of rectifying this"). The remaining employees will receive an affirmative signal that the Board will timely protect them if they face retaliation for participating in the campaign or supporting the Union. , 238 F.3d at 74-75 (ordering interim reinstatement of five employees); , 853 F.2d at 749-750 (interim reinstatement "would revive the union's organizational campaign"); , 605 F. Supp. 874, 886 (N.D. Ala. 1985) (interim reinstatement just and proper to revive the campaign and send "an affirmative signal that further union activity will not cause the kind of Company

retaliation that has occurred in the past"). Thus, interim reinstatement will vindicate the employees' right under § 7 to make a free choice, preserve the Board's remedial authority, and serve the public interest by ensuring that _____'s unfair labor practices do not succeed.[1]

[1] Interim reinstatement will pose little harm to _____. It is settled that the § 7 rights of discriminatees to interim reinstatement under § 10(j) outweigh the job rights of their replacements. *See Aguayo*, 853 F.2d at 750. Moreover, _____ will receive the experienced services of the employees and will retain its managerial right to impose lawful discipline. *See Pye*, 238 F.3d at 75.

APPENDIX H

SAMPLE 10(j) PLEADINGS

APPENDIX H

APPENDIX H-1

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC. Respondent.	Civil No. **ORDER TO SHOW CAUSE**

The Petition and Administrative Complaint of Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, having been filed in this Court pursuant to Section 10(j) of the National Labor Relations Act, as amended [29 U.S.C. § 160(j)], herein called the Act, praying for an order directing Recycling Industries, Inc., herein called Respondent, to show cause why a temporary injunction should not be granted as prayed for in said petition pending the final disposition of the administrative matters involved pending before said Board in Board Case 20-CA-29897-1 and, good cause appearing therefore,

IT IS ORDERED that Respondent appear before this Court at the United States Court house in Sacramento, California, on the _____ day of _____, _____, at _____ ___.m., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in Board Case 20-CA-29897-1, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys, and all persons acting on its behalf or in

participation with it, should not be temporarily enjoined and restrained under Section 10(j) of the Act, as prayed in said Petition; and

IT IS FURTHER ORDERED that Respondent file an Answer to the allegations of said Petition, together with any affidavits, declarations, and exhibits in support of said Answer that are limited to the issue of the equitable necessity of injunctive relief, with the Clerk of this Court, and serve copies thereof upon Petitioner at his office located at 901 Market Street, Suite 400, San Francisco, California, to be received on or before _____ p.m., the _____ day of _____, _____, and that Petitioner may file and serve rebuttal affidavits, declarations, and exhibits at least _____ day(s) before the hearing. Pursuant to Rule 220-7 of the Local Rules of this Court and pursuant to the Order of this Court, all evidence shall be presented by the transcript and exhibits in the proceeding before the administrative law judge of the Board in Board Case 20-CA-29897-1, and in affidavits, declarations, and exhibits limited to the issue of the equitable necessity of injunctive relief, and no oral testimony will be heard unless otherwise ordered by the Court; and

IT IS FURTHER ORDERED that service of copies of this Order, together with copies of the Petition, be made forthwith upon Respondent or upon its counsel of record in Board Case 20-CA-29897-1, in any manner provided in the Federal Rules of Civil Procedure, for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

ORDERED this _____ day of _____, 2001, at Sacramento, California.

_____

UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H-2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ALVIN BLYER, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD	*	
Petitioner	*	
	*	__--CV--____
v.	*	
P&W ELECTRIC, INC., d/b/a POLLARI ELECTRIC	*	
Respondent	*	

ORDER TO SHOW CAUSE

The petition of Alvin Blyer, Regional Director of Region 29 of the National Labor Relations Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for an order directing Respondent to show cause why a temporary injunction should not issue enjoining and restraining Respondent from engaging in certain acts and conduct in violation of the Act, as prayed for in said petition, the petition being verified, and to be supported by testimony and evidence, and good cause appearing therefor,

IT IS ORDERED that Respondent appear before this Court at the United States Courthouse, Court Room No. ____, 225 Cadman Plaza East, Brooklyn, New York, on the _____ day of January, 2001, at _____, or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the matters involved pending before the National Labor Relations Board, in

consolidated Case Nos. 29-CA-23527, 29-CA-23529 and 29-CA-23712, Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it, should not be enjoined and restrained as prayed in said petition; and

IT IS FURTHER ORDERED that should Respondent file an answer to the allegations of said petition, said answer shall be filed with the Clerk of this Court, and Respondent shall serve a copy thereof upon Petitioner at his office located at One MetroTech Center North, Tenth Floor, Brooklyn, New York 11201, on or before the ____ day of January, 2001, by _____, and deliver courtesy papers to chambers. Should Petitioner file a reply, such reply shall be served and filed by the ____ day of _____, 2001, by _____, and deliver courtesy papers to chambers; and

IT IS FURTHER ORDERED that service of a copy of this Order to Show Cause together with a copy of the petition, transcript and exhibits upon which it is issued, be forthwith made by a United States Marshal or an agent of the Board, 21 years or older, upon Respondent, and upon Local 25, International Brotherhood of Electrical Workers, a Charging Party before the Board, in any manner provided in the Rules of Civil Procedure for the United States District Court, by electronic facsimile transmission or by certified mail on or before the _____ day of _____, 2001, by _____, and that proof of such service be filed with the Court.

ORDERED this _____ day of January, 2001, at Brooklyn, New York.

BY THE COURT,

_____
UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ARTHUR R. DEPALMA, REGIONAL DIRECTOR, OF REGION 27 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. Civil No. _____

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 15320 and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

Respondents

ORDER TO SHOW CAUSE

The Petition and Administrative Complaint of Arthur R. DePalma, Regional Director for Region 27 of the National Labor Relations Board (herein NLRB or Board), having been filed in this Court pursuant to Section 10(j) of the National Labor Relations Act, as amended, 61 Stat. 149, 29 U.S.C. Sec. 160(j) (herein the Act), praying for a Temporary Restraining Order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) against Respondents United Steelworkers of America, Local No. 15320, (hereinafter Respondent Local), United Steelworkers of America, AFL-CIO-CLC, (hereinafter Respondent International) hereinafter collectively called Respondents, and for an order directing said Respondents to show cause why a temporary restraining order and a temporary injunction should not be granted as prayed for in said Petition

pending the final disposition of the administrative matters involved pending before said Board in NLRB Cases 27-CB-3271 and 27-CB-3272 and, good cause appearing therefore,

IT IS ORDERED that Respondents shall appear before this court at the United States Courthouse in Cheyenne, Wyoming, on the _____day of _____, 199 3, at _____ .m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending disposition by the Court of the merits of the instant Petition for a temporary injunction Respondents, their officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with them, should not be temporarily restrained pursuant to Section 10(j) of the Act and Fed. R. Civ. P. 65(b) as prayed for in said Petition; and

IT IS FURTHER ORDERED that Respondents, shall file an Answer to the allegations of said Petition with the Clerk of this Court, and serve a copy thereof upon Petitioner at his office located at 300 South Tower, 600 17th Street, Denver, Colorado 80202, on or before _____ day of _____, 1993; and

IT IS FURTHER ORDERED that Respondents, shall appear before this Court at the United States Courthouse in Cheyenne, Wyoming, on the _____ day of _____, 1993, at _____ .m. or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in NLRB Cases 26-CB-3271 and 27-CB-3272, Respondents, their officers, agents, servants, employees, attorney, and all persons acting in concert or participation with them, should not be temporarily enjoined and under Section 10(j) of the Act as prayed for in said Petition; and

APPENDIX H

IT IS FURTHER ORDERED that service of a copy of this Order, together with a copy of the Petition and Administrative Complaint, attached affidavits and exhibits and supporting legal memoranda, be forthwith made by a United States Marshal or an agent of the Board, 21 years of age or older, upon Respondents, United Steelworkers of America, Local No. 15320, and United Steelworkers of America AFL-CIO-CLC, or upon their counsel of record in NLRB Cases 27-CB-3271 and 27-CB-3272, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

ORDERED this ____ day of November, 1993, at Cheyenne, Wyoming.

BY THE COURT:

_____
UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H-4

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SANDRA DUNBAR, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Petitioner

vs. **CIVIL NO. 00-**

MSK CORP.-MAIN EVENT FOOD SERVICE

Respondent

PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable, the Judges of the United States District Court for the Western District of New York:

Comes now Sandra Dunbar, Regional Director of the Third Region of the National Labor Relations Board, herein called the Board, and petitions this Court, for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board, based upon the Complaint and Notice of Hearing of the Office of the General Counsel of the Board, alleging that MSK Corp.-Main Event Food Service, herein called Respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act. In support thereof, Petitioner respectfully shows as follows:

APPENDIX H

1. Petitioner is the Regional Director of the Third Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. On February 7, 2001, Local 4, Hotel Employees and Restaurant Employees Union, herein called the Union, pursuant to the provisions of the Act, filed with the Board an unfair labor practice charge in Case 3-CA-22915, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. (A copy of the charge in Case 3-CA-22915 is attached hereto as Exhibit A.)

4. The aforesaid charge was referred to the Petitioner as Regional Director of the Third Region of the Board.

5. On April 9, 2001, based upon the charge filed in the case described above in paragraph 3, the Acting General Counsel of the Board, by the Regional Director of the Third Region of the Board, on behalf of the Board, pursuant to Section 10(b) of the Act, issued a Complaint and Notice of Hearing against Respondent. (A copy of the Complaint is attached hereto as Exhibit B.)

6. There is reasonable cause to believe that the allegations set forth in the Complaint are true and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly, there is reasonable cause to believe that Respondent is failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees, described below in

paragraph 6(m), and herein called the Unit, in violation of Section 8(a)(1) and (5) of the Act, by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit. There is reasonable cause to believe that Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by interrogating its employees about their Union activities and sympathies. In support thereof, the Petitioner, upon information and belief, shows as follows:

(a) At all material times, Respondent, a corporation, with its principal office and place of business at the New York State Fairgrounds in Solvay, New York, and a branch office located at the Buffalo Raceway in Hamburg, New York, herein called Respondent's Hamburg facility, has been engaged in the operation of a restaurant and food service operation.

(b) Annually, Respondent, in conducting its business operations described above in paragraph II(a), derives gross revenues in excess of $500,000.

(c) Annually, Respondent, in conducting its business operations described above in paragraph II(a), purchases and receives at its Hamburg facility products, goods and materials valued in excess of $5,000 from points directly outside of the State of New York.

(d) At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(e) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(f) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent, within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Steven Jankiewicz -- Vice-president

Michael Chemotti -- Secretary-treasurer

(g) On or about February 2 and 3, 2001, Respondent, by Michael Chemotti, herein called Chemotti, at Respondent's Hamburg facility, interrogated employees about their Union activities and sympathies.

(h) At all material times prior to on or about January 1, 2001, the following employees of New York Sportservice, Inc., herein called the Sportservice Unit, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective-bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(i) At all material times prior to on or about January 1, 2001, the Union was the designated exclusive collective-bargaining representative for the Sportservice Unit for the purposes of collective bargaining with respect to wages, hours of employment and other terms and conditions of employment, and the Union was recognized as the representative by New York Sportservice, Inc. This recognition was embodied in

successive collective-bargaining agreements, the most recent of which was effective from January 1, 1998 through December 31, 2000.

(j) At all material times prior to on or about January 1, 2001, based on Section 9(a) of the Act, the Union was the exclusive collective-bargaining representative of the Sportservice Unit.

(k) On or about January 26, 2001, Respondent commenced to provide the restaurant and food services that were formerly provided by New York Sportservice, Inc. at the Buffalo Raceway in Hamburg, New York, and since January 26, 2001, has continued to operate such business in basically unchanged form, and has employed as a majority of its employees, individuals who were previously employed by New York Sportservice, Inc.

(l) Based on the operations described above in paragraph 6(k), Respondent has continued the employing entity and is a successor to New York Sportservice, Inc.

(m) The following employees employed by Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective-bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(n) At all times since on or about January 26, 2001, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the Unit.

(o) On or about January 26, 2001, the Union requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(p) Since on or about January 26, 2001, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit at Respondent’s Hamburg facility.

(q) By the conduct described above in paragraph 6(g), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

(r) By the conduct described above in paragraph 6(p), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

(s) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Upon information and belief, it may be fairly anticipated that, unless enjoined, Respondent will continue to engage in the said acts and conduct, or similar or related acts and conduct, and will continue to fail and refuse to bargain collectively and in good faith with the Union, in violation of Section 8(a)(1) and (5) of the Act.

8. Upon information and belief, unless the continuation of the aforementioned unfair labor practices is immediately restrained, a serious flouting of the Act and of public policies involved in the Act will continue, with the result that enforcement of important provisions of the Act and of the public policy will be impaired before Respondent can be placed under legal restraint through the regular procedures of a Board order and enforcement decree. Unless injunctive relief is immediately obtained, it may fairly be anticipated that Respondent will continue its unlawful conduct during the proceedings before the Board and during subsequent proceedings before a Court of Appeals for an enforcement decree, with the result that employees will continue to be deprived of their fundamental right to be represented for purposes of collective bargaining as provided for in the Act.

9. Upon information and belief, to avoid the serious consequences set forth above, it is essential, appropriate and just and proper, for the purposes of effectuating the policies of the Act and avoiding substantial, irreparable, and immediate injury to such policies, to the public interest, and to employees of Respondent, and in accordance with the purposes of Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct alleged above, similar acts and conduct or repetition thereof.

10. No previous application has been made for the relief requested herein.

WHEREFORE, Petitioner prays:

1. That the Court issue an order directing Respondent promptly to file an answer to the allegations of this petition and to appear before this Court, at a time and

place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, agents, representatives, servants, employees, attorneys, and all persons acting in concert or participation with them, pending the final disposition of the matters involved herein, pending before the Board, from:

(a) interrogating its employees concerning their Union activities and sympathies;

(b) refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following described collective bargaining unit, herein called the Unit:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(c) in any like or related manner failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the Unit.

(d) in any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. That the Court issue an affirmative order directing Respondent to:

(a) recognize and, upon request, bargain in good faith with the Union as the exclusive collective bargaining representative of the employees employed in the Unit at the Buffalo Raceway facility;

(b) post copies of the District Court's opinion and order at Buffalo Raceway facility, where Respondent's notices to employees are customarily posted; said posting shall be maintained during the Board's administrative proceedings, free from all obstructions and defacements; and agents of the Board shall be granted reasonable access to the Buffalo Raceway facility to monitor compliance with the posting requirement;

(c) within 20 days of the issuance of the Order, file with the District Court, with a copy submitted to the Regional Director of the Board for Region Three, a sworn affidavit from a responsible official of the Respondent, setting forth with specificity the manner in which the Respondent has complied with the terms of the decree, including how the documents have been posted as required by the order.

3. That the Court grant such further and other relief as may be deemed just and proper.

Dated at Buffalo, New York this 10th day of May 2001.

SANDRA DUNBAR, Regional Director
National Labor Relations Board - Region Three
Thaddeus J. Dulski Federal Building
111 West Huron Street - Room 901
Buffalo, NY 14202-2387

Office of the General Counsel
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APPENDIX H

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

**PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED**

To the Honorable, the Judges of the United States District Court for the Northern District of Indiana:

Comes now Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j); herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a complaint of the Acting General Counsel of the Board, charging that Great Lakes Distributing & Storage, Inc., herein called GLDS, and Great Lakes Packaging, Inc., herein called GLP and herein jointly called

respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act, 29 U.S.C. Sec. 158(a)(1) and (5). In support thereof, petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-fifth Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this proceeding is conferred upon this Court by Section 10(j) of the Act.

3. At all times material herein, respondent has maintained an office and place of business in Valparaiso, Indiana, where it is now and has at all times material herein been engaged in this judicial district in co-packaging, distribution and storage of food products.

4. On November 27, 2000, District No. 90, International Association of Machinists and Aerospace Workers, AFL-CIO, a/w International Association of Machinists and Aerospace Workers, AFL-CIO(herein called the Union), pursuant to the provisions of the Act, filed a charge with the Board against Great Lakes Distributing & Storage, Inc. (herein called GLDS) in Case 25-CA-27340-1, and on January 18, 2001 filed an amended charge in Case 25-CA-27340-1 Amended against GLDS and Great Lakes Packaging, Inc. (herein called GLP and together with GLDS herein called respondent), alleging that respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. A copy of the original charge is attached hereto as Exhibit A and a copy of the amended charge is attached hereto as Exhibit B.

5. On February 27, 2001, following a field investigation during which all parties had an opportunity to submit evidence upon the said charge as amended in Case 25-CA-27340-1 Amended, the Acting General Counsel of the Board, on behalf of the Board, by the petitioner herein, issued a complaint, pursuant to Section 10(b) of the Act [29 U.S.C. Sec. 160(b)], alleging that respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. A copy of this complaint is attached hereto as Exhibit C.

6. (a) At all material times GLDS and GLP have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises.

(b) Based on its operations described above in paragraph 6(a), GLDS and GLP constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(c) About November 11, 2000, respondent purchased the microwave popcorn packaging portion of the Valparaiso, Indiana facility of the Orville Redenbacher Popcorn Division of ConAgra Grocery Products Company, herein called Orville Redenbacher, and since then has continued to operate the microwave popcorn packaging portion of the business of the Valparaiso, Indiana facility of Orville Redenbacher in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Orville Redenbacher.

(d) Based upon the operations described above in paragraph 6(c), respondent has continued the employing entity of and is a successor to Orville Redenbacher.

(e) The following employees of respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act [29 U.S.C. Sec.159(b)]:

> All production and maintenance employees, including all shipping and receiving employees of the Employer at its Valparaiso, Indiana facility, but excluding all office clerical employees, all professional employees, all guards, and all supervisors as defined in the Act.

(f) On April 7, 1978, the Union was certified as the exclusive collective-bargaining representative of the Unit employed by Orville Redenbacher.

(g) Since about November 11, 2000, based on the facts described above in paragraphs 6(c) and 6(d), the Union has been the designated exclusive collective-bargaining representative of the Unit.

(h) From about April 7, 1978, to about June 1, 2000, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the Unit employed by Orville Redenbacher.

(i) At all times since about November 11, 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of respondent's employees in the Unit.

7. Petitioner asserts that there is a likelihood that the Regional Director will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended, establish that:

(a) At all material times GLDS, a corporation, with an office and place of business in Valparaiso, Indiana, herein called respondent's facility, has been engaged in the distribution and storage of food and other products.

(b) At all material times GLP, a corporation, with an office and place of business in Valparaiso, Indiana, the respondent's facility, has been engaged in the co-packaging of food products.

(c) During the past 12 months respondent, in conducting its business operations described above in paragraphs 7(a) and 7(b), sold and shipped from its Valparaiso, Indiana facility goods valued in excess of $50,000 directly to points outside the State of Indiana.

(d) During the past 12 months respondent, in conducting its business operations described above in paragraphs 7(a) and 7(b), purchased and received at its Valparaiso, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana.

(e) At all material times respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act [29 U.S.C. Sec. 152(2), (6) and (7)].

(f) At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act [29 U.S.C. Sec. 152(5)].

(g) At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of respondent within the meaning of Section 2(11) of the Act [29 U.S.C. Sec. 152(11)]and agents of respondent within the meaning of Section 2(13) of the Act [29 U.S.C. Sec. 152(13)]:

Joe Glusak	Owner and President
Bradly Hendrickson	Owner
David Jancosek	Owner

APPENDIX H

William English		Owner
Thomas Adams		Owner
Kim Defries	-	Line Supervisor
John Schlink		Maintenance Manager

(h) By letters dated November 20, 2000 and January 19, 2001, the Union requested that respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(i) Since about November 20, 2000, respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

(j) By the conduct described above in paragraph 7(i), respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

(k) The unfair labor practices of respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

(l) The unfair labor practices of respondent described above in paragraphs 7(i) and 7(j) have taken place within this judicial district.

8. Respondent's unfair labor practices, as described above in paragraph 7, have and are continuing to irreparably harm employees of the respondent in the exercise of the rights guaranteed them by Section 7 of the Act. More particularly, respondent's unfair labor practices have caused and will continue to cause the following harm:

(a) As a result of respondent's failure and refusal to bargain with the Union, the Union's employee support will be irreparably undermined over time as conditions change in the facility without any Union input.

(b) As a result of respondent's failure and refusal to bargain with the Union, the employees will be deprived of the benefits of collective bargaining.

9. An order requiring interim bargaining is necessary to prevent the irreparable erosion of the Union's majority support while the Union is unable to represent employees and affect their working conditions. Additionally, such an order is necessary to prevent irreparable harm to the employees through their loss of the benefits of collective bargaining during Board litigation.

10. Unless injunctive relief is immediately obtained, it can fairly be anticipated that employees will permanently and irreversibly lose the benefits of the Board's processes and the exercise of statutory rights for the entire period required for Board adjudication, a harm which cannot be remedied in due course by the Board.

11. There is no adequate remedy at law for the irreparable harm being caused by respondent's unfair labor practices, as described above in paragraphs 8 and 9.

12. Granting the temporary injunctive relief requested by Petitioner will cause no undue hardship to respondent.

13. In balancing the equities in this matter, the harm to the employees involved herein, to the public interest, and to the purposes and policies of the Act if injunctive relief, as requested, is not granted, outweighs any harm that the grant of such injunctive relief will work on respondent.

14. Upon information and belief, it may be fairly anticipated that unless respondent's conduct of the unfair labor practices described in paragraphs 7(i) and 7(j) above is immediately enjoined and restrained, respondent will continue to engage in those acts and conduct, or similar acts and conduct constituting unfair labor practices.

15. Upon information and belief, to avoid the serious consequences set forth above, it is essential, just, proper, and appropriate for the purposes of effectuating the policies of the Act and avoiding substantial, irreparable and immediate injury to such policies, to the public interest, and the employees involved herein, and in accordance with the purposes of Section 10(j) of the Act, that, pending final disposition of the matters presently pending before the Board, respondent be enjoined and restrained as herein prayed.

WHEREFORE, PETITIONER PRAYS:

1. That the Court issue an Order, directing respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why, pending final adjudication by the Board of the matters pending before it in National Labor Relations Board Case 25-CA-27340-1 Amended, a temporary injunction should not issue:

(a) directing and ordering respondent to cease and desist from: (1) failing and refusing to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit; and (2) in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act;

(b) directing and ordering respondent, pending final Board adjudication, to: (1) recognize and on request bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit respecting rates of pay, hours of work, or other terms and conditions of employment; (2) post copies of the district court's opinion and order at its Valparaiso, Indiana facility at all locations where notices to employees customarily are posted, maintain said postings during the pendency of the Board's administrative proceedings free from all obstructions and defacements, and grant agents of the Board reasonable access to respondent's Valparaiso, Indiana facility to monitor compliance with the posting requirement; and (3) within twenty (20) days of the issuance of the district court's order, file with the court, with a copy submitted to the Regional Director of the Board for Region 25, a sworn affidavit from a responsible official of respondent setting forth with specificity the manner in which respondent is complying with the terms of the decree.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and appropriate.

4. That the Court grant expedited consideration to this petition, consistent with 28 U.S.C. Sec. 1657(a) and the remedial purposes of Section 10(j) of the Act.

DATED at Indianapolis, Indiana, this 23rd day of April, 2001.

Roberto G. Chavarry, Regional Director
National Labor Relations Board
Region Twenty-five
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204-1577

Barry J. Kearney
Associate General Counsel

Rik Lineback
Regional Attorney

Joanne C. Mages
Attorney

APPENDIX H

APPENDIX H-6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	*	
Petitioner,	*	
v.	*	Civil No.
ALDWORTH COMPANY, INC. and DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC., JOINT EMPLOYERS	*	
Respondents.	*	

PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable, the Judges of the United States District Court for the District of New Jersey:

Comes now, Dorothy L. Moore-Duncan, Regional Director of the Fourth Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j), (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on charges alleging that Aldworth Company, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. (herein called Aldworth and Dunkin, respectively, and herein also collectively called Respondents), have

engaged in, and are engaging in, acts and conduct in violation of Section 8(a)(1), (3) and (5) of the Act. In support thereof, the Petitioner respectfully shows as follows:

1. The Petitioner is the Regional Director of the Fourth Region of the Board, an agency of the United States, and files this Petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. (a) On July 7, 1998, United Food and Commercial Workers Union Local 1360 a/w United Food And Commercial Workers International Union, AFL-CIO, herein called the Union), pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27274 alleging that Aldworth and Dunkin, employers within the meaning of Section 2(2) of the Act, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27274 is attached hereto as Exhibit 1 and made a part hereof.

(b) On October 22, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the first amended charge in Case 4-CA-27274 is attached hereto as Exhibit 2 and made a part hereof.

(c) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27274 is attached hereto as Exhibit 3 and made a part hereof.

(d) On April 15, 1999, the Union, pursuant to provisions of the Act, filed the third amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the third amended charge in Case 4-CA-27274 is attached hereto as Exhibit 4 and made a part hereof.

(e) On July 10, 1998, William A. McCorry, an individual, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27289 alleging that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27289 is attached hereto as Exhibit 5 and made a part hereof.

(f) On December 18, 1998, William A. McCorry, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27289 alleging that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27289 is attached hereto as Exhibit 6 and made a part hereof.

(g) On October 27, 1998, the Union, pursuant to provisions of the Act, filed the charge with the Board in Case 4-CA-27603 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27603 is attached hereto as Exhibit 7 and made a part hereof.

(h) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27603 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within

the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27603 is attached hereto as Exhibit 8 and made a part hereof.

(i) On November 5, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27629 alleging that Aldworth, an employer within the meaning of Section 2(2) of the Act, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27629 is attached hereto as Exhibit 9 and made a part hereof.

(j) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27629, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27629 is attached hereto as Exhibit 10 and made a part hereof.

(k) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27629, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27629 is attached hereto as Exhibit 11 and made a part hereof.

(l) On December 2, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27707 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27707 is attached hereto as Exhibit 12 and made a part hereof.

(m) On April 15, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27707, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27707 is attached hereto as Exhibit 13 and made a part hereof.

(n) On December 9, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27725 alleging, inter alia, that Aldworth and Dunkin, employers within the meaning of Section 2(2) of the Act, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27725 is attached hereto as Exhibit 14 and made a part hereof.

(o) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27725, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the first amended charge in Case 4-CA-27725 is attached hereto as Exhibit 15 and made a part hereof.

(p) On February 8, 1999, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27866 alleging, inter alia, that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27866 is attached hereto as Exhibit 16 and made a part hereof.

(q) On February 12, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27866, alleging that

Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27866 is attached hereto as Exhibit 17 and made a part hereof.

(r) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27866, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27866 is attached hereto as Exhibit 18 and made a part hereof.

4. On April 15, 1999, and April 22 1999, based upon the charges and amended charges in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, the General Counsel of the Board, on behalf of the Board, by the Petitioner, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, and Amendment to Consolidated Complaint, respectively, in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, pursuant to Section 10(b) of the Act, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. Copies of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, and Amendment to Consolidated Complaint in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866 are attached hereto as Exhibits 19 and 20, respectively and made a part hereof.

5. (a) On or about August 11, 1998, the Union filed a representation petition with the Board in Case 4-RC-19492, and an election was conducted on

September 19, 1998. A copy of the representation petition in Case 4-RC-19492 is attached hereto as Exhibit 21 and made a part hereof.

(b) On May 7, 1999, the Petitioner issued a Notice of Hearing on Objections to Election in Case 4-RC-19492, concluding that the Union's Objections to the representation election and other unalleged conduct raised issues in common with the unfair labor practices in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, and that, in due course, the Objections would be consolidated for hearing with the unfair labor practie charges. On May 18, 1999, the Petitioner issued issued an Order Consolidating Cases and Scheduling Consolidated Hearing in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725, 4-CA-27866 and 4-RC-19492. Copies of the Notice of Hearing on Objections to Election in Case 4-RC-19492, and of the Order Consolidating Cases and Scheduling Consolidated Hearing in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725, 4-CA-27866 and 4-RC-19492 are attached hereto as Exhibits 22 and 23 and made a part hereof.

6. There is reasonable cause to believe that the allegations set forth in the Consolidated Complaint and Notice of Hearing and in the Amendment to Consolidated Complaint in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866 are true, and that Respondents have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly, in support thereof, and of the request for injunctive relief herein, the Petitioner, upon information and belief, shows as follows:

APPENDIX H

(a) At all material times, Aldworth, a Massachusetts corporation with a principal place of business in Lynnfield, Massachusetts, has been engaged in the business of leasing personnel to enterprises in the transportation industry.

(b) During the past year, Aldworth, in conducting its business operations described above in subparagraph (a), purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts.

(c) At all material times, Aldworth has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(d) At all material times, Dunkin Donuts' has been a Delaware corporation with a facility at 501 Arlington Boulevard, Swedesboro, New Jersey, herein called the Center, where it has been engaged in the distribution of products to donut shops.

(e) During the past year, Dunkin' Donuts, in conducting its business operations described above in subparagraph (d), sold and shipped products valued in excess of $50,000 directly to points outside the States of New Jersey and Delaware.

(f) At all material times, Dunkin' Donuts has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(g) At all material times, Aldworth and Dunkin' Donuts have been parties to an agreement pursuant to which Aldworth has provided employees to work at, and to deliver products stored within, the Center; Dunkin' Donuts has exercised control over Aldworth's labor relations policy with respect to the employees who were hired and are paid by Aldworth; and Aldworth and Dunkin' Donuts have codetermined the terms and conditions of employment of those employees.

(h) At all material times, based on their operations at the Center described above in subparagraph (g), Aldworth and Dunkin' Donuts have been joint employers of the employees referred to above in subparagraph (g).

(i) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(j) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondents within the meaning of Section 2(11) of the Act and agents of Respondents within the meaning of Section 2(13) of the Act:

Ernest Dunn	-	Aldworth President
Kevin Roy	-	Aldworth Executive Vice President
Wayne Kundrat		Aldworth Assistant to Executive Vice President
Tim Kennedy	-	Aldworth Regional Operations Manager
Frank Fisher	-	Aldworth Operations Manager
Steve Wade	-	Aldworth Dispatcher/Warehouse Supervisor
Mark Kearney	-	Aldworth Warehouse Supervisor
Dave Mann	-	Aldworth Warehouse Supervisor
Keith Cybulski	-	Aldworth Warehouse Supervisor
Scott Henderschott	-	Aldworth Warehouse Supervisor
Juan Rivera	-	Aldworth Floor Supervisor
Kevin Donohue	-	Aldworth Floor Supervisor
Mike Houston	-	Aldworth Driver Supervisor
Craig Setter	-	Dunkin' Donuts President
Mike Shive	-	Dunkin' Donuts Distribution Center Manager
Tom Knoble	-	Dunkin' Donuts Transportation Supervisor
Warren Engard	-	Dunkin' Donuts Warehouse Supervisor

(k) Respondents, by Kevin Roy, engaged in the following conduct:

(1) In early April 1998, a more precise date being presently unknown to the Petitioner, in a meeting with its warehouse employees at the Center: (i) threatened employees with job loss if they sought union representation; and (ii) solicited

employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation.

(2) On or about April 11, 1998, in a meeting with employees at the Center: (i) solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation; (ii) promised employees he would hire a new Regional Operations Manager in order to discourage them from seeking union representation; and (iii) threatened employees with a loss of benefits by telling them that they would "start out with nothing" if they selected a union to bargain for them.

(3) On or about May 8, 1998, by letter to employees: (i) solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation; (ii) announced the creation of an "Issue Report Form" to solicit employees' complaints and grievances in order to discourage them from seeking union representation; and (iii) announced that certain of the grievances raised at the meeting referred to above in subparagraph (b), were being "adjusted" or "corrected" in order to discourage them from seeking union representation.

(4) On or about June 16, 1998, by letter to employees: (i) created the impression among its employees that their Union activities were under surveillance by telling them that he knew that Union representatives were visiting employees at their homes; (ii) solicited employees to report such "harassment" to him in order to discourage them from seeking Union representation; and (iii) solicited

employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking Union representation.

(5) On or about June 27, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) threatened employees with loss of their existing benefits by telling them that they would start with a blank piece of paper if they selected the Union as their collective bargaining representative; (ii) created the impression among its employees that their Union activities were under surveillance by telling them he knew that "Union people" were visiting employees at their homes; (iii) interrogated employees concerning their Union activities; (iv) threatened employees that another employee who supported the Union would be discharged, and disparaged the employee; (v) threatened employees with job loss if they selected the Union as their collective bargaining representative; and (vi) promised employees wage increases, new work attire and an improved benefits package in order to discourage them from seeking Union representation.

(6) On or about June 29, 1998, by telephone: (i) told an employee that another employee's termination resulted from that employee's Union activities; (ii) threatened the employee with discharge because the employee supported the Union; and (iii) solicited the employee to campaign against the Union and to tell other employees that the employee's suspension was unrelated to the employee's Union activities.

(7) In August 1998, a more precise date being presently unknown to the Petitioner, in his office at the Center, interrogated an employee concerning the employee's Union activities and the Union activities of other employees.

(8) On or about August 29, 1998, September 1, 1998, September 2, 1998, September 3, 1998, September 8, 1998, September 9, 1998, September 10, 1998, September 15, 1998, and September 17, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from selecting the Union as their collective bargaining representative.

(9) On or about September 1, 1998, September 3, 1998, and September 10, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, announced that Aldworth had responded favorably to complaints and grievances that employees had voiced earlier in order to discourage employees from selecting the Union as their collective bargaining representative.

(10) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, indicated to employees that it would be futile for them to select the Union as their collective bargaining representative by telling them: (i) on or about August 29, 1998, "Nobody from outside this room can force that change upon me without me saying so....Nobody has the force here" and that "...somebody else that doesn't belong in this room" can't do "a god damn thing unless I say so"; (ii) on or about September 1, 1998, that "There isn't one person outside this door, outside of our organization that is going to help me make it better"; and (iii) at one of the meetings, the

specific date of which is presently unknown to the Petitioner, by telling employees that he "would not deal with the Union" and that he would "show up at negotiations but did not have to agree to anything."

(11) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 8, 1998, September 15, 1998 and September 16, 1998, threatened employees with a loss of benefits by telling them, that they would start with a blank piece of paper if they selected the Union as their collective bargaining representative.

(l2) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 2, 1998, September 3, 1998, September 8, 1998, September 9, 1998, September 10, 1998, September 15, 1998, September 16, 1998 and September 17, 1998, threatened employees with loss of their jobs if they selected the Union as their collective bargaining representative.

(13) On or about August 29, 1998, after a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, threatened an employee with discharge because the employee engaged in Union activity.

(14) On or about August 29, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) informed employees that Respondents had suspended an employee because the employee spoke in favor of the Union and concertedly complained to Respondent regarding their wages, hours and conditions of employment at a meeting at the Holiday Inn in Bridgeport, New Jersey held in June 1998; and (ii) informed employees that Respondents had discharged an employee

because the employee spoke in favor of the Union at the earlier meeting at the Holiday Inn in Bridgeport, New Jersey.

(15) On or about September 10, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) threatened to discharge employees because the employees spoke in favor of the Union at the meeting; (ii) disparaged an employee because the employee supported the Union; and (iii) ejected an employee from the meeting because the employee supported the Union.

(16) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 10, 1998 and September 17, 1998: (i) promised to create new supervisory positions and promotion opportunities for the employees in order to discourage them from selecting the Union as their collective bargaining representative; and (ii) promised to remove an unpopular supervisor in order to discourage employees from selecting the Union as their collective bargaining representative.

(17) On or about September 1, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, created the impression among its employees that their Union activities were under surveillance by informing employees that he knew the identity of an employee who signed a Union authorization card and he knew the reason for the employee's decision to sign the authorization card.

(18) On or about September 10, 1998, September 15, 1998, September 16, 1998 and September 17, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, promised to improve employees medical insurance

benefits in order to discourage them from selecting the Union as their collective bargaining representative.

(19) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about September 15, 1998, September 16, 1998 and September 17, 1998, threatened employees with loss of their 401K plan if they selected the Union as their collective bargaining representative.

(20) On or about September 15, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, informed employees that he had ejected an employee from an earlier meeting at the Holiday Inn in Bridgeport, New Jersey because the employee voiced support for the Union.

(21) On or about September 16, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, threatened employees with discipline and other unspecified reprisals in order to discourage them from selecting the Union as their collective bargaining representative.

(l) Respondents, by Frank Fisher, engaged in the following conduct at the Center:

(1) In June 1998, a more precise date being presently unknown to the Petitioner, solicited an employee's complaints and grievances, thereby promising the employee improved terms and conditions of employment in order to discourage the employee from seeking union representation.

(2) In late August or early September 1998, a more precise date being presently unknown to the Petitioner, with Dave Mann, told an employee to take off a Union T-shirt, and directed the employee to turn the T-shirt inside out, while

permitting other employees to wear T-shirts with other logos and messages without interference.

(3) In or about early September 1998, a more precise date being presently unknown to the Petitioner, accused its employees of disloyalty by telling an employee that he wanted to thank employees for making his life a "living hell" by seeking Union representation.

(4) On or about September 17, 1998, threatened employees with less favorable consideration of requests for time off if they selected the Union as their collective bargaining representative.

(5) In October 1998, a more precise date being presently unknown to the Petitioner, threatened to withhold work boot allowance money from an employee because the employee supported the Union.

(6) On or about October 15, 1998, told an employee that the employee's suspension was related to the employee's Union sympathies and activities.

(7) In or about the end of April or early May 1999, a more precise date being presently unknown to the Petitioner, interrogated an employee concerning the unfair labor practice proceedings pending before the Board.

(m) Respondents, by Keith Cybulski, engaged in the following conduct at the Center:

(1) With Kevin Donohue, in late July or early August 1998, a more precise date being presently unknown to the Petitioner, interrogated an employee concerning the employee's Union sympathies.

(2) With Scott Henderschott, during the period between September 1, 1998 and September 17, 1998, threatened employees with job loss if they selected the Union as their collective bargaining representative.

(n) Respondents, by Dave Mann, engaged in the following conduct at the Center:

(1) In mid-August 1998, a more precise date being presently unknown to the Petitioner, threatened employees with job loss if they selected the Union as their collective bargaining representative.

(2) On or about September 17, 1998, threatened employees with more onerous working conditions if they selected the Union as their collective bargaining representative.

(o) In or about the end of October or early November 1998, a more precise date being presently unknown to the Petitioner, Respondents, by Scott Henderschott, at the Center, told an employee to take off a Union T-shirt, while permitting other employees to wear T-shirts with other logos and messages without interference.

(p) During the week beginning September 13, 1998, Respondents, by Kevin Donohue, at the Center, threatened employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

(q) During the week beginning September 6, 1998, Respondents, by Mike Shive and Wayne Kundrat, at the Center, engaged in surveillance of employees engaging in Union activities at the entrances to the Center's property.

(r) On or about September 10, 1998, Respondents, by Warren Engard, at the Center, threatened an employee with closure of the Center if the employees selected the Union as their collective bargaining representative.

(s) In the first part of September 1998, a more precise date being presently unknown to the Petitioner, Respondents, by Mike Shive, at the Center, told an employee to remove a Union pin from the employee's uniform.

(t) In or about mid-June 1999, a more precise date being presently unknown to the Petitioner, Respondents, by Mike Houston, at the Center, interrogated an employee concerning the employee's involvement in unfair labor practice proceedings before the Board.

(u) On or about June 27, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, Respondents' employee William A. McCorry, in order to induce group action, concertedly complained to Respondents regarding the wages, hours and working conditions of Respondents' employees by complaining about the safety and cleanliness of the stores at which Respondents' employees made deliveries.

(v) On or about July 18, 1998, Respondents issued a handbook to employees announcing, *inter alia*, stricter and more onerous policies concerning tardiness, absenteeism and log falsifications.

(w) Respondents engaged in the conduct described above in subparagraph (u): (i) because its employees were seeking Union representation; and (ii) because its employees engaged in the concerted activities described above in subparagraph (u), and to discourage them from engaging in these activities.

(x) On or about June 23, 1998, Respondents conducted a Route Survey on the route assigned to its employee William A. McCorry.

(y) On or about June 29, 1998, Respondents suspended employee William A. McCorry for five (5) days.

(z) Respondents engaged in the conduct described above in subparagraphs (x) and (y), because: (i) William A. McCorry engaged in the conduct described above in subparagraph (u); and (ii) because William A. McCorry supported and assisted the Union and in order to discourage employees from engaging in these or other concerted activities.

(aa) On or about June 29, 1998, Respondents discharged employee Leo Leo.

(bb) Respondents engaged in the conduct described above in subparagraph (aa), because Leo Leo supported and assisted the Union.

(cc) On or about October 14, 1998, Respondents issued five (5) day suspensions to its employees Doug King, Rob Moss, Dave Shipman and Jesse Sellers.

(dd) Respondents engaged in the conduct described above in subparagraph (cc), because Doug King, Rob Moss, Dave Shipman and Jesse Sellers supported and assisted the Union.

(ee) On or about October 21, 1998, Respondents changed the work shifts and job assignments of its employees Doug King, Ken Mitchell, Rob Moss, Dave Shipman and Jesse Sellers.

(ff) Respondents engaged in the conduct described above in subparagraph (ee), because Doug King, Ken Mitchell, Rob Moss, Dave Shipman, and Jesse Sellers supported and assisted the Union.

(gg) In early November 1998, a more precise date being presently unknown to the Petitioner**,** Respondents suspended its employee Jesse Sellers for one day.

(hh) Respondents engaged in the conduct described above in subparagraph (gg), because its employee Jesse Sellers supported and assisted the Union.

(ii) On or about November 19, 1998, Respondents discharged its employee Rob Moss.

(jj) Respondents engaged in the conduct described above in subparagraph (ii), because its employee Rob Moss supported and assisted the Union.

(kk) In early October 1998, a more precise date being presently unknown to the Petitioner, Respondents implemented, and began enforcing, a new "Selection Accuracy Policy."

(ll) Since in or about early October 1998, Respondents, pursuant to the Selection Accuracy Policy referred to above in subparagraph (kk), have discharged its employees Carl Nelson, Ken Mitchell, Jesse Sellers and Doug King and other similarly situated employees whose names are presently unknown to the Petitioner.

(mm) Respondents engaged in the conduct described above in subparagraphs (kk) and (ll) above because its employees supported and assisted the Union.

APPENDIX H

(nn) The following employees of Respondents, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, warehouse employees, yard jockeys, maintenance employees and warehouse trainees employed by Respondents at the Center, excluding all other employees, guards and supervisors as defined in the Act.

(oo) On or about July 27, 1998, a majority of the Unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondents.

(pp) At all times since on or about July 27, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

(qq) By the conduct described above in subparagraphs (k) through (t) and (v) through (z), Respondents have been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

(rr) By the conduct described above in subparagraphs (v) through (mm), Respondents have been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

(ss) The conduct described above in subparagraphs (k) through (t), (v) through (mm), (qq) and (rr), is so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair rerun

election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

(tt) On or about July 28, 1998, the Union, by letter, requested Respondents to recognize it as the exclusive collective bargaining representative of the Unit and bargain collectively with it as the exclusive collective bargaining representative of the Unit..

(uu) Since on or about July 28, 1998, Respondents have failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Unit.

(vv) The subjects described above in subparagraphs (kk) and (ll) concern wages, hours and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(ww) Respondents engaged in the conduct described above in subparagraphs (kk) and (ll), without prior notice to the Union and without having afforded the Union an opportunity to bargain with Respondents concerning this conduct.

(xx) By the conduct described above in subparagraphs (kk), (ll), (uu) and (ww), Respondents have been failing and refusing to bargain collectively with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

(yy) The unfair labor practices of Respondents described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Upon information and belief, it may be fairly anticipated that, unless restrained, Respondents will continue their aforesaid unlawful acts and conduct in violation of Section 8(a)(1), (3) and (5) of the Act.

8. Upon information and belief, unless the continuation or repetition of the above described unfair labor practices is restrained, a serious failure of enforcement of important provisions of the Act, and of the public policy embodied in the Act, will result before an ultimate order of the Board can issue.

9. Upon information and belief, to avoid the serious consequences set forth above, it is essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act and of avoiding substantial, irreparable and immediate injury to such policies, to employees, and to the public interest, and in accordance with Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondents be enjoined and restrained from the commission of the acts and conduct alleged above, similar or related acts or conduct or repetitions thereof.

WHEREFORE, the Petitioner prays:

1. That the Court enter an order directing Respondents, Aldworth Company , Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondents, their officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with them, pending final disposition of the matters involved herein pending before the Board, from:

(a) threatening employees with job loss if they seek Union representation;

(b) soliciting employee complaints and grievances and promising to improve terms and conditions of employment in order to discourage employees from seeking Union representation;

(c) threatening employees with loss of benefits if they support the Union;

(d) announcing the creation of benefits in order to discourage employees from seeking Union representation;

(e) creating the impression among its employees that their Union activities are under surveillance;

(f) soliciting employees to report on the Union activities of others in order to discourage Union activity;

(g) interrogating employees about their Union activities, the Union activities of other employees, or the employees' involvement in unfair labor practice proceedings before the National Labor Relations Board;

(h) threatening to discharge, suspend or otherwise discipline employees because they support the Union;

(i) promising employees wage increases, new work attire and improved benefits packages in order to discourage them from seeking Union representation;

(j) telling employees that other employees' discharges and suspensions resulted from the employees' Union and other protected activities;

(k) soliciting employees to campaign against the Union and to falsely tell other employees that discipline they have received was unrelated to Union activity;

(l) announcing that employees' complaints have been responded to favorably in order to discourage employees from seeking Union representation;

(m) telling employees that selecting the Union as their bargaining representative will be futile;

(n) disparaging employees because they support and assist the Union and engage in other protected activities;

(o) ejecting employees from employer-held meetings with employees because the employees support the Union;

(p) promising to create new supervisory positions and promotional opportunities for employees in order to discourage them from selecting the Union as their bargaining representative;

(q) promising to remove unpopular supervisors in order to discourage employees from selecting the Union as their collective bargaining representative;

(r) promising to improve employees' medical insurance benefits in order to discourage them from seeking Union representation;

(s) threatening employees with loss of their 401K benefits if they select the Union as their collective bargaining representative;

(t) threatening employees with discipline and other unspecified reprisals in order to discourage them from selecting the Union as their collective bargaining representative;

(u) directing employees to remove Union T-shirts, buttons or other items with the Union logo while permitting other employees to wear T-shirts, buttons, or other items with other logos without interference;

(v) accusing employees of disloyalty because they seek Union representation;

(w) threatening employees with less favorable consideration of requests for time off if they select the Union as their collective bargaining representative;

(x) threatening to withhold boot allowance money from employees because they support the Union;

(y) threatening employees with more onerous working conditions if they select the Union as their collective bargaining representative;

(z) engaging in the surveillance of Union activities;

(aa) threatening employees with closure of the Distribution Center if they select the Union as their collective bargaining representative;

(bb) instituting new policies that establish more onerous conditions of employment because employees seek Union representation;

(cc) discharging, suspending or otherwise disciplining employees because they support the Union or engage in other protected activities;

(dd) failing or refusing to recognize and upon request bargain with the Union as the exclusive collective bargaining representative of employees in the following bargaining unit (Unit):

> All full-time and regular part-time drivers, warehouse employees, yard jockeys, maintenance employees and warehouse trainees employed by Respondents at the

Center, excluding all other employees, guards and supervisors as defined in the Act.

(ee) unilaterally instituting new terms and condition of employment including the new Selection Accuracy Policy

(ff) in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights.

2. That the Court enter an Order directing Respondents, their officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with them, pending final disposition of the matters involved herein pending before the Board, to:

(a) on an interim basis, offer Leo Leo, Carl Nelson, Robert Moss, Kenneth Mitchell, Jesse Sellers, Douglas King, and all other employees who were discharged pursuant to the new Selection Accuracy Policy reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed, and displacing, if necessary, any employee who has been hired or reassigned to replace them;

(b) on an interim basis, offer employees Robert Moss, Kenneth Mitchell, Jesse Sellers and Douglas King reinstatement to the positions and shifts they held prior to October 13, 1998;

(c) on an interim basis, recognize, and upon request, bargain in good faith with the Union as the exclusive bargaining representative of the Unit;

(d) on an interim basis, rescind and cease giving effect to the "new Selection Accuracy Policy," first implemented in early October 1998;

(e) on an interim basis, restore the terms and conditions of employment as they existed for Unit employees on July 27, 1998;

(f) post copies of the District Court's Opinion and Order in Respondents' Swedesboro, New Jersey facility, in all locations where other notices to employees are customarily posted; maintain these postings during the Board's administrative process free from all obstructions and defacements; and grant to agents of the Board reasonable access to these facilities in order to monitor compliance with the posting requirement; and

(g) within twenty (20) days of the issuance of the District Court's Order, file with the District Court, and serve a copy to Petitioner, a sworn affidavit from a responsible official of Respondents, setting forth with specificity the manner in which Respondents have complied with the Court's Order including where exactly Respondents have posted the documents required by the Order.

3. That upon return of the order to show cause, the Court issue an order enjoining and restraining Respondent in the manner set forth above.

4. That the Court grant such further and other relief as may be just and proper.

Signed at Philadelphia, Pennsylvania this 28th day of July, 1999.

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APPENDIX H

APPENDIX H-7

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC., Respondent.	Civil No. PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160(j)]

To the Honorable, the Judges of the United States District Court,
Eastern District of California

Comes now Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, and petitions this Court, for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. § 160 (j)], herein called the Act, for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a Complaint of the Acting General Counsel of the Board charging that Recycling Industries, Inc., herein called Respondent, is engaging in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act [29 U.S.C. § 158(1) and (3)]. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is the Regional Director of Region 20 of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2. Jurisdiction of the Court is invoked pursuant to Section 10(j) of the Act, which provides, inter alia, that the Board shall have power, upon issuance of a complaint charging that any person has engaged in unfair labor practices, to petition any

United States district court within any district wherein the unfair labor practices in question are alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary injunctive relief or restraining order pending final disposition of the matter by the Board.

3. On November 15, 2000, the International Longshore and Warehouse Union, Local 17, herein called the Union, filed with the Board an original charge in Board Case 20-CA-29897-1 alleging that Respondent is engaged in unfair labor practices in violation of Section 8(1), (3), (4) and (5) of the Act. On December 14, 2000, a first-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (4) of the Act. On January 11, 2001, a second-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3). On January 31, 2001, a third-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3).

4. The aforesaid charges were referred to Petitioner as Regional Director of Region 20 of the Board.

5. Upon investigation, Petitioner determined that there is reasonable cause to believe, as alleged in the aforesaid charges, that Respondent is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

6. On February 28, 2001, the Regional Director of Region 20 of the Board, upon such charges and pursuant to Section 10(b) of the Act [29 U.S.C. § 160(b)], issued a Complaint against Respondent alleging that Respondent is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

7. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, true copies of the aforesaid Complaint and charges in Board Case 20-CA-29897-1 are

attached hereto and marked as Exhibits 1-5, respectively, and are incorporated herein as though fully set forth.

8. There is a likelihood that the allegations set forth in the Complaint are true and that Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. More specifically, and as more particularly described in the Complaint attached hereto as Exhibit 1, Petitioner alleges that there is a likelihood that Petitioner will establish the following:

(1) (a) At all material times, Respondent, a corporation with an office and place of business in Sacramento, California, has been engaged in the business of processing recyclable materials.

(b) During the twelve-month period ending May 31, 2000, Respondent, in conducting its business operations described above in 1(a), sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of California.

(2) At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act [29 U.S.C. §§ 152(2), (6), and (7)].

(3) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act [29 U.S.C. § 152(5)].

(4) (a) At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Scott Kuhnen	-	General Manager
David Kuhnen	-	Treasurer
Jose Sanchez	-	Labor Consultant

(b) At all material times, prior to an unknown date in October 2000, Antonio Cortes occupied the position of leadman for Respondent and was an agent of Respondent within the meaning of Section 2(13) of the Act.

(c) At all material times, after an unknown date in October 2000, Antonio Cortes has occupied the position of Supervisor for Respondent and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

(5) (a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by the Employer at its 3300 Power Inn Road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(b) During the period from about May 17 to June 3, 2000, a majority of the Unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondent.

(c) At all times since June 3, 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(6) Respondent, by Jose Sanchez, at Respondent's facility:

(a) On various unknown dates in about June 2000, told employees that Respondent would never accept the Union as their collective-bargaining

representative thereby informing employees it would be futile for them to select the Union as their representative.

(b) On an unknown date in about June 2000, threatened employees that Respondent would go bankrupt and lay off all its employees if they selected the Union as their collective-bargaining representative.

(7) (a) On an unknown date in about June 2000, Respondent, by Antonio Cortes, at Respondent's facility, announced that effective July 2000, employees would receive a wage increase as an inducement for them to abandon their support for the Union.

(b) On unknown dates in July 2000, Respondent granted a wage increase to its Unit employees in order to induce them to abandon their support for the Union.

(c) On an unknown date in November or December 2000, Respondent, by Antonio Cortes, at Respondent's facility, solicited employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative.

(8) (a) About July 4 and 5, 2000, Respondent held a raffle with substantial cash prizes for its Unit employees.

(b) As a condition of participating in the raffle described above in subparagraph 8(a), Respondent required its employees to complete and give to Respondent for review, a questionnaire containing questions calculated to determine their union sympathies.

(9) (a) About May 31, 2000, Respondent suspended its employee Jorge Ontiveros for one day without pay.

(b) About October 12, 2000, Respondent suspended its employee Jose Hernandez for two days without pay.

(c) About October 27, 2000, Respondent suspended its employee Juan Orozco for one day without pay.

(d) About October 27, 2000, Respondent discharged its employee Jorge Ontiveros.

(e) About January 19, 2001, Respondent suspended its employee Juan Orozco for five days without pay.

(f) Respondent engaged in the conduct described above in subparagraph 9(a) through (e) because the employees named therein joined and/or assisted the Union and engaged in union and/or concerted activities and to discourage employees from engaging in these activities.

(10) The conduct described above in paragraphs 6 through 9 is so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

(11) By the conduct described above in paragraphs 6 through 8, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

(12) By the conduct described above in paragraph 9, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.

(13) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

9. It may fairly be anticipated that, unless enjoined, Respondent will continue to repeat the acts and conduct set forth in paragraph 8 or similar or like acts in violation of Section 8(a)(1) and (3) of the Act.

10. It is likely that substantial and irreparable harm will result to Respondent's employees and their statutorily protected right to organize unless the aforesaid unfair labor practices are immediately enjoined and appropriate relief granted. By its unlawful conduct, including its termination of union adherent Jorge Ontiveros, its threats not to accept the Union as the collective-bargaining representative of its employees, its threat to go bankrupt and lay off all its employees, and granting a unit-wide wage increase, Respondent has, for now, succeeded in nipping that campaign "in the bud." That blow to the organizing campaign is not likely to be remedied through the regular administrative procedures of a Board Order and an Enforcement Decree of the Court of Appeals, which could take years to conclude. By then, the momentum of the organizing campaign likely will have dissipated, with the result that Respondent will have achieved its ultimate objective of thwarting the organizing campaign, with little likelihood of that damage being undone by remedies imposed at the conclusion of the administrative and appellate process. Moreover, studies show that, as time goes by, the probability increases that employees who have been discharged will obtain work elsewhere and will be more reluctant to return to work for the employer that unlawfully terminated them, thereby further dissipating an organizing union's base of support and

correspondingly further enabling an employer, such as Respondent, to reap irreversible benefits from its unlawful conduct, all in disregard of the policies of the Act and the public interest.

11. Upon information and belief, it is submitted that, in balancing the equities in this matter, the harm that will be suffered by the Union, the employees, and the public interest, and the purposes and policies of the Act if injunctive relief is not granted greatly outweighs any harm that Respondent may suffer if such injunctive relief is granted.

12. Upon information and belief, to avoid the serious consequences referred to above, it is essential, just and proper, and appropriate for the purposes of effectuating the remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, the public interest, the employees, and the Union, and in accordance with the purposes of Section 10(j) of the Act that, pending final disposition by the Board, Respondent be enjoined and restrained as herein prayed.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court issue an order directing Respondent to file an answer to each of the allegations set forth and referenced in the said Petition and to appear before the Court, at a time and place fixed by the Court, and show cause, if any there be, why, pending final disposition of the matters herein involved now pending before the Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, should not be enjoined and restrained from the acts and conduct described above, similar or like acts, or other conduct in violation of Section 8(a)(1) and (3) of the Act, or repetitions thereof, and that the instant Petition be disposed of on the basis of affidavit and documentary evidence, without oral testimony, absent further order of the Court.

(2) That the Court issue an order directing Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons

acting on its behalf or in participation with it, to cease and desist from the following acts and conduct, pending the final disposition of the matters involved now pending before the National Labor Relations Board:

(a) telling employees that it would be futile for them to select the Union as their representative;

(b) threatening to file bankruptcy and lay off its employees if they select the Union as their collective-bargaining representative;

(c) announcing and subsequently granting wage increases to employees as an inducement for them to abandon their support for the Union;

(d) soliciting employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative;

(e) requiring employees to complete a questionnaire containing questions calculated to determine their union sympathies as a condition of participating in a raffle with substantial cash prizes;

(f) disciplining, suspending or discharging employees because of their Union and/or other protected concerted activity.

(h) in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act;

(3) That the Court further order Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, to take the following steps pending the final disposition of the matters herein involved now pending before the National Labor Relations Board:

(a) offer interim employment to Jorge Ontiveros to his former job position and working conditions, or if that position no longer exists, to a

substantially equivalent position without prejudice to his seniority or rights and privileges, displacing, if necessary, any newly hired or reassigned worker;

(b) recognize and bargain with International Longshore and Warehouse Union, Local 17, AFL-CIO, as the collective-bargaining representative of its employees in the following unit:

> All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by Respondent at its 3300 Power Inn Road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(c) rescind and remove from employees' personnel files any reference to unlawful disciplinary actions/warnings and refrain from relying upon such discipline in the future;

(d) post copies of the District Court's Temporary Injunction and Findings of Fact and Conclusions of Law, in English and Spanish, at Respondent's 3300 Power Inn Road, Sacramento, California facility, in all locations where notices to its employees are normally posted; maintain these postings during the Board's administrative proceeding free from all obstructions and defacement; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to its Sacramento, California facility to monitor compliance with the posting requirement; and

(e) within twenty (20) days of the issuance of the Court's order, file with the Court, with a copy submitted to the Regional Director of the Board for Region 20, a sworn affidavit from a responsible official of Respondent, setting forth with specificity the manner in which Respondent is complying with the terms of the decree, including the locations of the posted documents.

(4) That upon return of said Order to Show Cause, the Court issue an order enjoining and restraining Respondent as prayed and in the manner set forth in Petitioner's proposed temporary injunction lodged herewith.

(5) That the Court grant such other and further temporary relief that may be deemed just and proper.

DATED AT San Francisco, California, this 14th day of May, 2001.

Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

JOSEPH P. NORELLI
Regional Attorney, Region 20
WILLIAM A. BAUDLER
Supervisory Attorney, Region 20
KAHTLEEN C. SCHNEIDER
Attorney, Region 20

APPENDIX H

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT ASHLAND

D. RANDALL FRYE, Regional Director of the Ninth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Petitioner

v. Civil No.

DISTRICT 1199, THE HEALTH CARE AND SOCIAL SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC

Respondent

MOTION FOR TEMPORARY RESTRAINING ORDER UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable Judges of the United States District Court for the Eastern District of Kentucky at Ashland:

The petition of D. Randall Frye, Regional Director of the Ninth Region of the National Labor Relations Board, herein called the Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for appropriate injunctive relief against District 1199, The Health Care and Social Service Union, Service Employees International Union, AFL-CIO-CLC, herein called respondent, pending final disposition of the matters involved herein pending before the Board, now comes petitioner and respectfully avers as follows:

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Upon information and belief as more fully appears from the affidavits attached hereto, and made a part hereof, substantial and irreparable injury will unavoidably result to the policies of the Act and to M.E.B. Incorporated d/b/a J.J. Jordan Geriatric Center, herein called J.J. Jordan Geriatric Center, the charging party before the Board, its employees, and the patients for whom it provides care**,** from a continuation of respondent's unlawful conduct.

WHEREFORE, petitioner moves;

1. That the Court issue a temporary restraining order forthwith enjoining and restraining respondent, its officers, agent's, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days duration as provided for in Rule 65(b) of the Federal Rules of Civil Procedure, from: restraining or coercing the employees of J.J. Jordan Geriatric Center, or of any other person doing business with J.J. Jordan Geriatric Center, by:

(a) Engaging in mass picketing thereby blocking ingress to and egress from, or in any other manner, preventing, attempting to prevent or hindering employees, customers, suppliers or other persons from entering or leaving the Louisa, Kentucky facility of J.J. Jordan Geriatric Center.

(b) Inflicting, or attempting to inflict injury or damage to the persons or property, including motor vehicles, of any employees or any persons doing business with J.J. Jordan Geriatric Center.

(c) Threatening nonstriking employees or others with injury to their person, their families, or damage to property.

(d) Possessing weapons on the picket line or taking pictures of nonstriking employees or other persons crossing its picket line.

(e) In any other manner, or by any other means. restraining or coercing the employees of J.J. Jordan Geriatric Center or of any person doing business with J.J. Jordan Geriatric Center, in the exercise of their rights guaranteed under Section 7 of the Act.

2. That the Court issue an order directing respondent to appear before this Court, at a time and place to be fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining respondent, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved, pending before the Board, in the manner set forth above and in the petition.

3. That upon the return of the order to show cause, this Court issue an order enjoining and restraining respondent in the manner set forth above and in the petition.

4. That this Court grant such other and further relief as may be deemed just and proper.

Dated at Cincinnati, 0hio this 15th day of July 1992.

D. Randall Frye. Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

JERRY M. HUNTER
General Counsel
ROBERT E. ALLEN
Associate General Counsel
EARL L. LEDFORD

APPENDIX H

Acting Regional Attorney

_____

Carol. L. Shore, Trial Attorney
Region 9, National Labor Relations Board

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	*	
Petitioner,	*	
v.	*	Civil No.
HORIZON HOUSE DEVELOPMENTAL SERVICES, INCORPORATED	*	
Respondent.	*	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This cause came to be heard upon the verified petition and amended petition of Dorothy L. Moore-Duncan, Regional Director of the Fourth Region of the National Labor Relations Board (herein called the Board), for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160 (j); (herein called the Act), pending the final disposition of the matters involved herein pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition and amended petition. The Court has fully considered the petition, evidence and arguments of counsel and upon the entire record, the Court makes the following:

APPENDIX H

FINDINGS OF FACT

1. Petitioner is Regional Director for the Fourth Region of the Board, an agency of the United States, and files this Petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. On October 2, 2000, District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO, (herein called the Union), pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-29830 alleging that Respondent, an employer within the meaning of Section 2(2) of the Act, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. On February 23, 2001, based upon the charge in Cases 4-CA-29830, the Acting General Counsel of the Board, on behalf of the Board, by the Petitioner, issued a Complaint and Notice of Hearing in Case 4-CA-29830, pursuant to Section 10(b) of the Act, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. There is, and Petitioner has reasonable cause to believe, that the allegations set forth in the Complaint and Notice of Hearing in Case 4-CA-29830 are true, and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly:

(a) At all material times, Respondent, a Pennsylvania corporation with an office at 120 South 30th Street, Philadelphia, Pennsylvania, has been engaged in providing health care and related services to the mentally disabled.

(b) During the past year, Respondent, in conducting its business operations described above in subparagraph (a), received gross revenues in excess of $250,000 and purchased and received at its Philadelphia, Pennsylvania office goods valued in excess of $5,000 directly from points outside the Commonwealth of Pennsylvania.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

(d) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(e) At all material times, Robert Lindsey and Rita Kucsan held the positions of Respondent's Human Resources Manager and Director of Human Resources, respectively, and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

(f) At all material times, since at least July 27, 2000, Respondent has designated its attorney Guy Vilim as its negotiator for bargaining with the Union and, in that capacity, he has been an agent of Respondent within the meaning of Section 2(13) of the Act.

(g) The following employees of Respondent constitute a unit, herein called the Unit, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time and substitute Resident Advisors II and III employed in the Bucks County,

> Pennsylvania Division of Respondent, excluding all other employees, including home coordinators, team coordinators, program specialists guards and supervisors as defined in the Act.

(h) On July 3, 1997, the Union was certified as the exclusive collective bargaining representative of the Unit.

(i) At all material times, since July 3, 1997, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

(j) In July 1999, a more precise date being presently unknown to the General Counsel, date being presently unknown to the Petitioner, Respondent and the Union entered into their first collective bargaining agreement, herein called the Agreement, effective by its terms from December 21, 1998 through September 30, 2000.

(k) On or about July 1, 2000, the Union, by letter, requested Respondent to begin negotiations for a new collective bargaining agreement.

(l) From on or about August 14, 2000 until on or about September 30, 2000, the Union, by several telephone calls from its negotiator Vivian Gioia to Guy Vilim, attempted to schedule negotiations for a new collective bargaining agreement.

(m) Since, on or about July 1, 2000, Respondent has failed and refused to bargain with the Union for a new collective bargaining agreement.

(n) Respondent did not respond to the telephone calls described above in subparagraph (b).

(o) On or about August 14, 2000, the Union, by letter to Rita Kucsan requested the following information: (1) recent payroll run; (2) medical benefit

information that included the amount paid by the employees, the amount paid by the employer, and the actual premium cost; and (3) the number of regular and overtime hours worked by each employee during the past 12 months per pay period.

(p) On or about August 30, 2000, the Union, by facsimile transmission to Robert Lindsey, requested the "Leave/Bank" policy referred to in Article 19 of the Agreement.

(q) The information described above in subparagraphs (o) and (p), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(r) Since, on or about August 14, 2000, Respondent has failed and refused to furnish to the Union the information described above in subparagraph (o).

(s) Since, on or about August 30, 2000, Respondent has failed and refused to furnish to the Union the information described above in subparagraph (p).

(t) On or about August 30, 2000, the Union filed grievances protesting the following terms and conditions of employment of the Unit: (1) supervisors performing bargaining unit work; (2) employees not being paid overtime; and (3) failure to post work schedules.

(u) The subjects set forth above in subparagraph (a), relate to wages, hours and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(v) Since, on or about August 30, 2000, Respondent has failed and refused to process the grievances described above in subparagraph (t).

(w) Petitioner has reasonable cause to believe that, by the conduct described above in subparagraphs (m), (n), (r), (s) and (v), Respondent has been failing and refusing to bargain with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act and that the unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. It may be fairly anticipated that, unless enjoined and restrained, Respondent will continue its aforesaid unlawful acts and conduct in violation of Section 8(a)(1) and (5) of the Act.

7. Unless the continuation or repetition of the above described unfair labor practices is restrained, a serious failure of enforcement of important provisions of the Act, and of the public policy embodied in the Act, will result before an ultimate order of the Board can issue.

8. To avoid the serious consequences set forth above, it is essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act and of avoiding substantial, irreparable and immediate injury to such policies, to employees, and to the public interest, and in accordance with Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct described, similar or related acts or conduct or repetitions thereof.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of the proceeding, and under Section 10(j) of the Act, is empowered to grant injunctive relief.

2. There is, and Petitioner has reasonable cause to believe that:

(a) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(b) The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

(c) Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these unfair labor practices will impair the policies of the Act as set forth in Section 1(b) thereof.

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just, and proper that, pending the final disposition of the matters herein involved pending before the Board, Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, be enjoined and restrained from the commission, continuation, or repetition, of the acts and conduct set forth in Finding of Facts paragraph 5, subparagraphs (m), (n), (r), (s), (v) and (w) above, acts or conduct in furtherance or support thereof, or like or related acts or conduct, the commission of which in the future is likely or may fairly be anticipated from Respondent's acts and conduct in the past.

Done at Philadelphia, Pennsylvania this _____ day of _____, 2001.

APPENDIX H

_____

Harvey Bartle, III,
U.S. District Court Judge

APPENDIX H-10

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on to be heard upon the verified petition of Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board, herein called the Board, for preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court has fully

considered the petition, evidence and arguments of counsel and upon the entire record, the Court makes the following:

I. FINDINGS OF FACT:

1. Petitioner is the Regional Director of the Twenty-fifth Region of the Board, an agency of the United States, and filed this petition for and on behalf of the Board.

2. On or about November 27, 2000, District No. 90, International Association of Machinists and Aerospace Workers, AFL-CIO, a/w International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, filed a charge with the Board, and on January 18, 2001 filed an amended charge with the Board alleging, inter alia, that Great Lakes Distributing & Storage, Inc., herein called GLDS, and Great Lakes Packaging, Inc., herein called GLP and herein jointly called respondent, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

3. The aforesaid charges were referred the Regional Director of the Twenty-fifth Region of the Board.

4. On February 27, 2001, upon the charges filed against respondent by the Union, the Acting General Counsel of the Board, on behalf of the Board, by the Regional Director, pursuant to Section 10(b) of the Act, issued a complaint and notice of hearing against respondent alleging that respondent engaged in violations of Section 8(a)(1) and (5) of the Act.

5. There is a substantial likelihood that the Petitioner will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended, establish that:

APPENDIX H

(a) At all material times GLDS and GLP have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises.

(b) Based on its operations described above in Findings of Fact 5(a), GLDS and GLP constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

` (c) About November 11, 2000, respondent purchased the microwave popcorn packaging portion of the Valparaiso, Indiana facility of the Orville Redenbacher Popcorn Division of ConAgra Grocery Products Company, herein called Orville Redenbacher, and since then has continued to operate the microwave popcorn packaging portion of the business of the Valparaiso, Indiana facility of Orville Redenbacher in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Orville Redenbacher.

(d) Based upon the operations described above in Findings of Fact 5(c), respondent has continued the employing entity of and is a successor to Orville Redenbacher.

(e) At all material times respondent, with an office and place of business in Valparaiso, Indiana, herein called respondent's facility, has been engaged within this judicial district in the co-packaging, distribution and storage of food products. During the past twelve months, respondent, in conducting its business

operations described above, purchased and received at its Valparaiso, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana. During the past twelve months, respondent, in conducting its business operations described above, sold and shipped from its Valparaiso, Indiana, facility goods valued in excess of $50,000 directly to points outside the State of Indiana. At all material times respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(f) The Union, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment, and is a labor organization within the meaning of Section 2(5) of the Act.

(g) The following employees of respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act [29 U.S.C. Sec.159(b)]:

> All production and maintenance employees, including all shipping and receiving employees of the Employer at its Valparaiso, Indiana facility, but excluding all office clerical employees, all professional employees, all guards, and all supervisors as defined in the Act.

(h) On April 7, 1978, the Union was certified as the exclusive collective-bargaining representative of the unit described above in Findings of Fact 5(g), herein also called the Unit.

(i) At all times since November 11, 2000, and continuing to date, based on the Findings of Fact 5(c) and 5(d), the Union has been the designated exclusive

collective-bargaining representative for the purpose of collective bargaining of the employees in the Unit.

(j) From about April 7, 1978 to about June 1, 2000 the Union had been the representative for the purpose of collective bargaining of the employees in the Unit described above in Findings of Fact 5(g) and, by virtue of Section 9(a) of the Act, has been and is now, the exclusive representative of all the employees in said Unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(k) At all times since November 11, 2000, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the Unit described above in Findings of Fact 5(g), and, by virtue of Section 9(a) of the Act, has been and is now, the exclusive representative of all the employees in said Unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(l) At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of respondent within the meaning of Section 2(11) of the Act [29 U.S.C. Sec. 152(11)] and agents of respondent within the meaning of Section 2(13) of the Act[29 U.S.C. Sec. 152(13)]:

Joe Glusak	-	Owner and President
Bradly Hendrickson		Owner
David Jancosek		Owner
William English		Owner
Thomas Adams		Owner

Kim Defries	-	Line Supervisor
John Schlink		Maintenance Manager

(m) By letters dated November 20, 2000 and January 19, 2001, the Union requested that respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(n) Since about November 20, 2000, respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

6. By the acts and conduct set forth above there is a substantial likelihood that the Regional Director will establish in the underlying administrative proceeding before the Board that respondent has interfered with, restrained and coerced its employees, and is interfering with, restraining and coercing its employees, in the exercise of their rights guaranteed to them by Section 7 of the Act; that respondent has failed and refused, and continues to fail and refuse to bargain collectively with the Union as the collective bargaining representative of its employees; and that by all of said conduct respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Unless the interim relief requested is granted and respondent is enjoined and restrained from engaging in the unfair labor practices referred to above, a serious flouting of the Act will continue with the result that enforcement of important provisions of the Act and of public policy will be thwarted because of the reduction of the

possibility of fully restoring the status quo ante is provided. It may be fairly anticipated that, unless enjoined, respondent will continue to repeat the acts and conduct described above in Findings of Fact 5(n), or similar or like acts and conduct, in violation of Section 8(a)(1) and (5) of the Act, with the result that employees will be deprived of the rights guaranteed to them by the Act because of the improbability of being able to restore them to the status quo ante. Such harm clearly outweighs any harm respondent will suffer if the requested injunctive relief is granted.

It is, therefore, essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act, and in accordance with the provisions of Section 10(j) thereof, that pending final disposition of the matters involved herein pending before the Board, respondent be enjoined and restrained from the commission of the acts and conduct set forth in the order granting preliminary injunction in this case.

CONCLUSIONS OF LAW:

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding and, under Section 10(j) of the Act, is empowered to grant injunctive relief.

2. There is a substantial likelihood that Petitioner will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended establish that:

(a) The Union is a labor organization within the meaning of Sections 2(5), 8(b) and 10(j) of the Act.

(b) Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(c) Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these practices will impair the policies of the Act, as set forth in Section 1(b) thereof.

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just and proper, that pending the final disposition of the matters herein involved pending before the Board, respondent, its officers, representatives, agents, servants, employees, and all members and persons acting in concert or participation with them, be enjoined as set forth hereinafter in the order granting preliminary injunction in this case.

Entered: , 2001

_____

U. S. District Court Judge

APPENDIX H

APPENDIX H-11

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN KOLLAR, ACTING REGIONAL DIRECTOR FOR. REGION 8 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

CIVIL NO. 4:99 CV 0392
JUDGE PETER C. ECONOMUS

UNITED STEELWORKERS OF AMERICA, LOCAL No.2155

and

UNITED STEELWORKERS OF AMERICA, LOCAL No. 2155-7

Respondents

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came to be heard upon the verified petition of John Kollar, Acting Regional Director of the Eighth Region of the National Labor Relations Board, herein called the Board, for a preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court, upon consideration of the pleadings,

evidence, briefs, arguments of counsel, and the entire record in the case, has made and filed its findings of fact and conclusions of law finding and concluding that there is reasonable cause to believe that Respondents have engaged in, and are engaging in, acts and conduct in violation of Section 8(b)(1)(A) of the Act, affecting commerce within unless enjoined.

Now, therefore, upon the entire record, it is,

ORDERED, ADJUDGED AND DECREED, pending the final disposition of the matters involved pending before the Board:

1. That Respondents, United Steelworkers of America Locals No. 2155 and 2155-7, their officers, agents, representatives, servants, employees, and all members and persons acting in concert or participation with them be, and they hereby are, enjoined and restrained from restraining and coercing the employees, or supervisors, or management personnel in the presence of employees of RMI Titanium Company, herein called RMI, or any other person doing business with RMI, by:

(a) Engaging in mass picketing thereby blocking ingress to and egress from, or in any other manner preventing, attempting to prevent or hindering employees, customers, or suppliers from entering or leaving the RMI Titanium facility located in Niles, Ohio.

(b) Inflicting or attempting to inflict injury or damage to the person or property, including motor vehicles, of any employees or any persons doing business with RMI Titanium.

(c) Threatening non-striking employees or others with injury to their person, their families or damage to their property.

(d) Possessing any rocks, bricks projectiles, sticks, clubs, jack-rocks, nails, explosive devices or any other dangerous weapons at the Respondents' picket lines maintained at RMI's Niles, Ohio facility, or within one mile of such facility.

(e) Surveilling employees and/or persons doing business with RMI at RMI's Niles, Ohio facility by the use of video cameras, film or digital cameras and/or the written recording of automobile license plate numbers.

(f) Engaging in any mass picketing, blocking of ingress and egress into or out of RMI's Niles, Ohio facility and/or by engaging in oral threats and/or physical assaults against property or persons along Warren Avenue for a distance of one mile in both directions from RMI's Niles, Ohio facility, which creates a "gauntlet" to persons either entering or leaving the Niles facility

(g) In any other manner, or by any other means, restraining or coercing the employees or supervisors or management personnel in the presence of employees of RMI Titanium or any other person doing business with RMI Titanium, in the exercise of their rights guaranteed under Section 7 of the Act.

2. (a) That Respondents provide each of their officers, representatives, agents, members and picketers with a copy of this Order and a clear written directive to refrain from engaging in any picket line misconduct enjoined by this Court, or any other similar conduct.

(b) That Respondents post in their business offices and local meeting halls the Court's Opinion and Order In this case.

(c) That Respondents provide to this Court, with copies submitted to the Regional Director of the Eighth Region of the Board within ten (10) days of the issuance

of this Order, sworn affidavits describing with specificity what steps they have taken to comply with the terms of this injunction, including proof of service of the above document.

(d) That Respondents designate a picket line captain at all times they maintain a picket line at RMI's Niles, Ohio facility, who will be present at the picket line and who will control the conduct of all pickets, and the schedule of identified picket captains shall at all times be given beforehand to the National Labor Relations Board

(e) That Respondents shall, before each employee shift change at RMI's Niles, Ohio facility, police and remove any and all debris in the entranceways and roadways at the entrances to Gates 1 and 3 at the Niles facility.

3. That the United States Marshals take all actions deemed necessary to enforce the provisions and prohibitions set forth in this Order.

4. That this case shall remain on the docket of this Court and on compliance by Repondents with their obligations undertaken hereto, and upon disposition of the matters pending before the Board, the Petitioner shall cause this proceeding to be dismissed.

Dated at Youngstown, Ohio this 10th day of March 1999.

_____

Peter C. Economus
United States District Judge

APPENDIX H

APPENDIX H-12

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came to be heard upon the verified petition of Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board, herein called the Board, for preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court, upon consideration of the pleadings, evidence, briefs, arguments of counsel, and the entire record in this case, has made and filed its findings of fact and conclusions of law finding and concluding that there is a likelihood that the Regional Director will, in the

underlying Board proceeding, establish that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending final disposition of the matters involved pending before the National Labor Relations Board, herein called the Board, an injunction issue enjoining and restraining and ordering and directing respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., its officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with it or them, as follows:

A. Enjoining and restraining respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., from:

(i) failing and refusing to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit;

(ii) in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act;

B. Ordering and directing respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., pending final Board adjudication, to:

(i) recognize and on request bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate

collective bargaining unit respecting rates of pay, hours of work, or other terms and conditions of employment; (ii) post copies of the district court's opinion and order at its Valparaiso, Indiana facility at all locations where notices to employees customarily are posted, maintain said postings during the pendency of the Board's administrative proceedings free from all obstructions and defacements, and grant agents of the Board reasonable access to respondent's Valparaiso, Indiana facility to monitor compliance with the posting requirement; and (iii) within twenty (20) days of the issuance of the district court's order, file with the court, with a copy submitted to the Regional Director of the Board for Region 25, a sworn affidavit from a responsible official of respondent setting forth with specificity the manner in which respondent is complying with the terms of the decree.

IT IS FURTHER ORDERED that this case shall remain on the docket of this Court and on compliance by respondent with its obligations undertaken hereto, and upon disposition of the matters pending before the Board, the petitioner shall cause this proceeding to be dismissed.

Dated at Hammond, Indiana, this _____ day of _____, 2001.

_____
United States District Judge

APPENDIX H

APPENDIX H-13

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

**********		
LEONARD P. BERNSTEIN, Acting Regional	*	
Director for Region Seventeen of the	*	
National Labor Relations Board,	*	
for and on behalf of the	*	
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
v.	*	Civil No.
	*	
CARTER & SONS FREIGHTWAYS, INC.	*	
	*	
Respondent	*	
**********		

ORDER GRANTING TEMPORARY INJUNCTION

This cause came on to be heard upon the verified petition of Leonard P. Bernstein, Acting Regional Director of the Seventeenth Region of the National Labor Relations Board, for and on behalf of said Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said

petition. The Court, upon consideration of the pleadings, evidence, memoranda, argument of counsel, and the entire record in the case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (3) of said Act, affecting commerce within the meaning of Section 2(6) and (7) of said Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters involved pending before the National Labor Relations Board, Respondent Carter & Sons Freightways, Inc., its officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with it or with them, be and they hereby are enjoined and restrained from:

(a) Terminating its employees because of their support for and activities on behalf of the International Brotherhood of Teamsters, Local Union No. 795, AFL-CIO (the Union);

(b) Subcontracting its work to other companies in order to avoid unionization or bargaining with the Union;

(c) Threatening to close its facility and to discharge employees if employees continue to support the union, or its employees select the Union as their collective-bargaining representative;

(d) Ordering employees to retrieve union authorization cards they have signed on behalf of the Union;

(e) Threatening employees with unspecified reprisals because employees continued their support for and activities on behalf of the Union;

(f) Interrogating employees about their union activities and support and the union activities and support of other employees;

(g) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters pending before the National Labor Relations Board, Respondent Carter & Sons Freightways, Inc. its officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with it or them, shall take the following affirmative action:

(a) Restore and reinstitute the operations at the Wichita, Kansas facility to their status as of June 19, 1997;

(b) Offer interim reinstatement at the Wichita, Kansas facility, to employees Bill Casselman, Steve Hoelscher, Ed Newman, and Glen Tucker at their previous wage rates and working conditions;

(c) Recognize and, upon request, bargain in good faith with the International Brotherhood of Teamsters, Local Union No. 795, AFL-CIO, as the exclusive collective-bargaining representative of the Unit described below at Respondent's Wichita, Kansas facility, concerning their wages, hours, and other terms and conditions of employment. This bargaining obligation is effective retroactive to June 19, 1997. The unit is:

> All full-time and regular part-time city pickup and delivery drivers and road drivers employed by Respondent at its facility located in Wichita, Kansas, but excluding office

clerical employees, dispatchers, professional employees, guards, and supervisors as defined in the Act.

(d) Post copies of the District Court's Opinion and Order, at Respondent's Wichita, Kansas facility where notices to employees are customarily posted, said postings to be maintained during the pendency of the Board's administrative proceedings free from all obstructions and defacements; and grant to agents of the National Labor Relations Board reasonable access to Respondent's Wichita, Kansas facility to monitor compliance with this posting requirement;

(e) File within twenty days of the issuance of the District Court's Opinion and Order, with a copy submitted to the Regional Director of Region 17 of the National Labor Relations Board, a sworn affidavit from a responsible official of Carter & Sons Freightways, Inc., setting forth with specificity the manner in which Respondent has complied with the terms of this Order.

Done at Wichita, Kansas this _____day of _____, 1997.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H-14

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC. Respondent.	Civil No. TEMPORARY INJUNCTION

This case came to be heard upon the verified Petition of Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, for and on behalf of the Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [29 U.S.C. § 160(j)], herein called the Act, pending the final disposition of the matters herein involved now pending before said Board, and upon the issuance of an Order to Show Cause why injunctive relief should not be granted as prayed in said Petition. All parties were afforded full opportunity to be heard, and the Court, upon consideration of the pleadings, the affidavits, declarations, and exhibits, the briefs and arguments of counsel, and the entire record in the case, has made its Findings of Fact and Conclusions of Law, finding and concluding that, in the underlying administrative proceeding in Board Case 20-ca-29897-1, there is a likelihood that Petitioner will establish that Recycling Industries, Inc., herein called Respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (3) of the Act [29 U.S.C. § 158(a)(1) and (3)] affecting commerce within the meaning of Section 2, subsections (6) and (7) of the Act [29 U.S.C.

§ 152(6) and (7)], and that in balancing the equities in this matter, the said violations of the Act will likely be repeated or continued and will irreparably harm the employees and the Union and the public interest, and will thwart the purposes and policies of the Act, unless enjoined.

Now, therefore, upon the entire record, it is hereby

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters now pending before the National Labor Relations Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, be, and they hereby are, enjoined and restrained from:

(a) telling employees it would be futile for them to select International Longshore and Warehouse Union, Local 17, AFL-CIO, herein referred to as the Union, as their representative;

(b) threatening to file bankruptcy and lay off its employees if they select the Union as their collective bargaining representative;

(c) announcing and subsequently granting wage increases to employees as an inducement for them to abandon their support for the Union;

(d) soliciting employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative;

(e) requiring employees to complete a questionnaire containing questions calculated to determine their union sympathies as a condition of participating in a raffle with substantial cash prizes;

(f) disciplining, suspending or discharging employees because of their Union and/or protected concerted activity.

(g) in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

APPENDIX H

It is further

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters herein now pending before the National Labor Relations Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, shall within five (5) days hereof, take the following steps:

(a) offer interim employment to Jorge Ontiveros to his former job position and working conditions, or if that job position no longer exists, to a substantially equivalent position without prejudice to his seniority or rights and privileges, displacing, if necessary, any newly-hired or reassigned worker;

(b) recognize and bargain with the Union as the collective bargaining representative of its employees in the bargaining unit concerning their wages, hours and other terms and conditions of employment, including providing the Union with advance notice and an opportunity to bargain over any intended changes to their wages, hours and other terms and conditions of employment;

The appropriate bargaining unit is:

> All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by Respondent at its 3300 Power Inn road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(c) rescind and remove from employees' personnel files any reference to unlawful disciplinary actions/warnings and refrain from relying upon such discipline in the future;

(d) post copies of the Court's Temporary Injunction and Findings of Fact and Conclusions of Law, in both Spanish and English, at Respondent's 3300 Power Inn Road, Sacramento, California facility, in all locations where notices to its employees are normally posted; maintain these postings during the Board's

administrative proceeding free from all obstructions and defacement; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to the facility to monitor compliance with the posting requirement; and

(e) within twenty (20) days of the issuance of the Court's order, file with the Court, with a copy submitted to the Regional Director of the Board for Region 20, a sworn affidavit from a responsible official of Respondent, setting forth with specificity the manner in which Respondent is complying with the terms of the decree.

DATED AT San Francisco, California, this _____ day of _____, 2001.

_____
United States District Judge

APPENDIX H

APPENDIX H-15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN KOLLAR, Acting Regional Director for Region 8 of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board,	)	**CASE NO. 4:99 CV 0392**
Petitioner	)	**JUDGE PETER C. ECONOMUS**
vs.	)	
UNITED STEEL WORKERS OF AMERICA, LOCAL NO. 2155 and UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2155-7,	)	
Respondents	)	

TEMPORARY RESTRAINING ORDER

The petition of John Kollar, Acting Regional Director for Region 8 of the National Labor Relations Board, herein the Board, for and on behalf of the Board, having been filed and properly served on United Steelworkers of America Local No. 2155 and Local No. 2155-7, herein jointly referred to as the Respondents, pursuant to Section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(j), herein the Act, following the issuance of the unfair labor practice complaint in Case 8-CA-_____, praying for a temporary injunction order against the Respondents, pending final disposition of the matters involved herein pending before the Board, and Petitioner having filed a motion for a temporary restraining order, pursuant to Fed. R. Civ. P.

65(b), the petition and motion being verified and supported by affidavits and exhibits; and

IT APPEARING to the Court from the verified petition, motion, other pleadings, affidavits, exhibits, argument of counsel, the hearing held before the Court on _____, and the entire record in this matter, that:

1. There is reasonable cause to believe [in traditional equity circuits, use the "likelihood of success on the merits" standard] that Respondents are statutory labor organizations within the meaning of Section 2(5) of the Act;

2. There is reasonable cause to believe that the Respondents through their agents have engaged, inter alia, in picket line violence, threats and property damage, mass picketing and blocking of ingress and egress at the facility of RMI Titanium located in Niles, Ohio;

3. There is reasonable cause to believe that the above-described conduct of the Respondents violates Section 8(b)(1)(A) of the Act and that said unfair labor practices affect commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act;

4. There is substantial evidence that local police authorities and state courts are unable to control and abate the misconduct of the Respondents;

5. There is imminent danger that, absent immediate injunctive relief, substantial and irreparable injury to the statutory rights of employees under the Act will be inflicted by the Respondents and that the final administrative order of the Board will be frustrated or nullified if interim relief is not granted; and

6. It is appropriate and just and proper, within the meaning of Section 10(j) and Fed. R. Civ. P. 65(b) that, pending completion of the hearing before the Court on the merits of the petition, and for a period of ten (10) days from the entry of this Order, that the Respondents be temporarily enjoined and restrained from the commission of further acts and misconduct in violation of the Act as described in the petition.

WHEREFORE, IT IS HEREBY ORDERED that United Steelworkers of America Local No. 2155 and Local No. 2155-7, herein jointly referred to as the Respondents, their officers, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days' duration from the date of this Order, as provided for in Rule 65(b) of the Federal Rules of Civil Procedure and pursuant to Section 10(j) of the Act, are **ENJOINED AND RESTRAINED** from:

1. Engaging in any mass picketing or blocking ingress to or egress from the RMI Titanium facility located in Niles, Ohio;

2. Inflicting or attempting to inflict injury or damage to persons or property, including motor vehicles, of any employees of RMI Titanium or of any persons doing business with RMI Titanium;

3. Threatening non-striking employees or other individuals with injury to their person or their families, or with damage to their property;

4. Possessing any rocks, bricks, projectiles, sticks, clubs, jackrocks, nails, explosive devices or any other dangerous weapons at the Respondents' picket lines maintained at the Niles, Ohio facility of RMI Titanium, or within one mile of such facility;

5. Surveilling employees and/or persons doing business with RMI Titanium at its Niles, Ohio facility by the use of video cameras, film, or digital cameras and/or the written recording of automobile/truck license plate numbers;

6. Engaging in any mass picketing, blocking of ingress or egress into or out of the Niles, Ohio facility of RMI Titanium by engaging in any oral threats and/or physical assaults against property or persons along Warren Avenue for a distance of one mile in both directions from the Niles, Ohio facility, which creates a "gauntlet" to persons either entering or leaving the Niles facility;

7. In any other manner, or by any other means, restraining or coercing the employees of RMI Titanium or any other person doing business with RMI Titanium in the exercise of their rights guaranteed under Section 7 of the Act.

IT IS FURTHER ORDERED that, to assure compliance with the Court's temporary restraining order and because of the local authorities' inability to deal with the situation, the United States Marshals Service **IS DIRECTED** to take those actions deemed necessary to enforce the provisions and prohibitions set forth in this Order. A copy of this Order shall be served upon the United States Marshal for the Northern District of Ohio.

IT IS FURTHER ORDERED that service of a copy of this Order be made forthwith by a United States Marshal upon the Respondents, United Steelworkers of America Local No. 2155 and Local No. 2155-7, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts and that proof of such service be filed with the Court.

SO ORDERED this ___ day of _____, at _____am/pm at Cleveland, Ohio.

APPENDIX H

_____

PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX I

SAMPLE PLEADINGS AND ARGUMENTS FOR 10(j) PROTECTIVE ORDER OR SEQUESTRATION OF ASSETS

APPENDIX I

APPENDIX I-1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of Region 29 of the National Labor
Relations Board, for and on behalf of
the NATIONAL LABOR RELATIONS BOARD

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK, INCORPORATED

Respondent

****

ORDER TO SHOW CAUSE

The Motion for Temporary Restraining Order and the Petition of Alvin Blyer, Regional Director for Region Twenty-Nine of the National Labor Relations Board (herein called the NLRB or Board), having been filed in this Court pursuant to Section 10(j) of the National Labor Relations Act, as amended, 61 Stat. 149, 29 U.S.C. Sec. 160 (j) (herein called the Act), praying for a Temporary Restraining Order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P) against Respondent Unitron Color Graphics of New York, Incorporated also known as LIC Group, Inc. (hereinafter Respondent) and praying for issuance of an order directing said Respondent to show cause why a temporary injunction should not be granted as prayed for in said Petition for Temporary Injunction pending the final disposition of the administrative

matters involved pending before said Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 and, good cause appearing therefore,

IT IS ORDERED that Respondent shall appear before this Court at the United States Courthouse, Court Room , 225 Cadman Plaza East, Brooklyn, New York, on the __10th__ day of ___March____1998, at ___2:00 p.m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending disposition by the Court of the merits of the instant Petition for a temporary injunction, a temporary restraining order should not issue, enjoining and restraining Respondent, its representatives, agents, servants, employees, attorneys, and all persons acting in concert or participation with it, pursuant to Section 10(j) of the Act and Fed. R. Civ. P. 65(b) as prayed for in the aforesaid Petition; and

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations of said Petition with the Clerk of this Court, and serve a copy thereof upon Petitioner at his office located at National Labor Relations Board, Twenty-Ninth Region, One MetroTech Center North, 10th Floor, Brooklyn, New York 11201, on or before the _____ day of _____ 1998, at _____; and

IT IS FURTHER ORDERED that upon issuance of any temporary restraining order in this matter, Respondent shall appear before this Court at the United States Courthouse in Brooklyn, New York, on the _____ day of _____1998, at ____.m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680, a temporary injunction should not issue enjoining and restraining Respondent, its

representatives, officers, agents, servants, employees, attorneys and all persons acting in concert or participation with it, under Section 10(j) of the Act as prayed for in said Petition; and

IT IS FURTHER ORDERED that service of a copy of this Order, together with a copy of the Petition and Administrative Complaint, attached affidavits and exhibits and supporting legal memoranda, be forthwith made by an United States Marshal or an agent of the Board, 21 years age or older, upon Respondent, and Applied Graphics Technologies, L.P. or its counsel, Marc Kramer, Esq., in any manner provided in the Federal Rules and of Civil Procedure for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

I find that based on the affidavit of service of Robert Califf, that effective notice of this matter has been provided to Respondent and that the Court has jurisdiction herein under 10(j) of the Act.

ORDERED this day of , 1998, at Brooklyn, New York.

BY THE COURT;

_____

UNITED STATES DISTRICT JUDGE

APPENDIX I

APPENDIX I-2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of the Twenty-Ninth Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK INCORPORATED

Respondent

****

STATE OF NEW YORK)
) s.s.:
COUNTY OF KINGS)

I, Alvin Blyer, being duly sworn, depose and say:

1. I am the Regional Director for Region 29 of the National Labor Relations Board. I have read the foregoing Motion for Temporary Restraining Order and Petition for Temporary Injunction and know the contents thereof and the statements therein made as upon personal knowledge are true and those made as upon information and belief I believe to be true.

2. Pursuant to Rule 3(c)(4) of the General Rules of the United States District Court For the Eastern District of New York and 28 U.S.C., Sec. 1657, this proceeding was brought on by application for Order to Show Cause, rather than by Notice of Motion, for the following reasons:

APPENDIX I

(a) I have reasonable cause to believe that the activities of Respondent, Unitron Color Graphics of New York, Incorporated, described in the Petition and exhibits, occurring in connection with the business operations of other employers engaged in commerce or in industries affecting commerce, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to and do lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and it may fairly be anticipated that, unless appropriate injunctive relief, including a temporary restraining order is immediately obtained, that Respondent will dissipate or disperse its present income and assets, as well as the assets and income it will derive in the future, with the result that the affected employees will be denied their statutory rights to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(b) Section 10(j) of the National Labor Relations Act reflects the Congressional determination that because of the sometimes necessarily protracted and time-consuming legal procedures, Congress gave the Board power in the public interest to seek injunctive relief to prevent persons who are violating the Act from accomplishing their unlawful purpose. In Section 10(j), therefore, Congress gave the Board power to petition any District Court of the United States for appropriate temporary relief. The legislative history of the Act shows that Congress intended such power to be exercised by the Court. S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947).

3. Accordingly, I respectfully submit that the Congressional mandate referred to above indicates that the most expeditious procedures available should be utilized in proceedings of this nature, and that, therefore, good and sufficient reason exists within the meaning of General Rule 3(c)(4) to bring this matter on by Order to Show Cause, rather than by Notice of Motion. This action for Injunction Under Section 10(j) of the Act, seeks to restrain conduct which is currently obstructing or leading to the obstruction of interstate commerce. Therefore, good cause exists within the meaning of 28 U.S.C.

APPENDIX I

Sec. 1657 to expedite consideration of this case by allowing it to be heard upon an Order to Show Cause rather than upon a Notice of Motion.

(c) No previous application has been made for the order or relief sought herein.

4. On March 9, 1998, Respondent was notified that the Board would be making application for a temporary injunction order on this date. No attorney has appeared in this matter for Respondent.

_____

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

Subscribed and sworn to before me this
th day of March, 1998

_____

Anthony A. Ambrosio
Notary Public, State of New York
No. 30-5066035
Qualified in Nassau County
Commission Expires on , 19

APPENDIX I

APPENDIX I-3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

****

RONALD S. COHEN, Acting Regional Director
of the First Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.,

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

****

PETITION FOR TEMPORARY INJUNCTION PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160 (J)]
[AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]][1]

To the Honorable, the Judges of the United States District Court, District of Massachusetts:

Comes now Ronald S. Cohen, Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 29 U.S.C. Sec. 160 (j); herein called the Act), for appropriate injunctive relief, pending the final disposition of the matters involved herein pending

[1] [The All Writs Act applies only when the Region is authorized to enjoin a third party that is not a party to the underlying unfair labor practice case.]

before the Board on an administrative consolidated complaint of the General Counsel of the Board charging that Estoril Cleaning Co., Inc. (herein called Respondent or Estoril) has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. Sec. 158 (a)(1) and (5). In support thereof, Petitioner respectfully shows as follows:

1.

Petitioner is the Acting Regional Director of the First Region of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the Respondent is invoked pursuant to Section 10(j) of the Act.

3.

(A) On or about the dates set forth below in subparagraphs (1)-(4), Service Employees International Union, Local 254, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) The charge in Case 1-CA-37811 was filed by the Union on January 6, 2000, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(2) A charge and a first amended charge in Case 1-CA-37828 were filed by the Union on January 14, 2000 and February 17, 2000, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case 1-CA-37875 was filed by the Union on February 8, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(4) The charge in Case 1-CA-37931 was filed by the Union on February 24, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5).

(B) Based upon the charges filed in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, and after investigation of the aforesaid charges in which Respondent was given the opportunity to present evidence and legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Estoril on February 28, 2000. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by engaging in certain conduct including, *inter alia*, refusing to execute an agreed upon collective-bargaining agreement; failing and refusing to provide relevant information which was requested by the Union; and failing and refusing to bargain over the effects on unit employees of Respondent's decision to close its operations. (Copies of the foregoing charges and the Consolidated Complaint are attached hereto and are made a part hereof as Exhibits Nos. (1) (a)-(d) and (2), respectively.)

(C) Based upon the charge filed in Case 1-CA-37931, and after investigation of aforesaid charge in which Respondent was given the opportunity to present evidence and

legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued a Complaint and Notice of Hearing (herein called the Complaint) and a Second Order Consolidating Cases against Estoril on March 7, 2000. The Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to pay employees for hours worked in January 2000. (Copies of the foregoing Charge, the Complaint and the Second Order Consolidating Cases are attached hereto and are made a part hereof as Exhibits Nos. (3), (4), and (5) respectively.)

4.

(A) A hearing on the allegations in the Consolidated Complaint and the Complaint described in paragraphs 3(B) and 3(C) above is scheduled to be held before an Administrative Law Judge of the Board on April 3, 2000.

(B) Counsel for the General Counsel seeks in this pending administrative proceeding an order against the Respondent from the Board, pursuant to Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), which will include a monetary remedy of backpay as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as well as wages due for work performed by the bargaining unit employees described in paragraph 5(F) below in January 2000.

5.

Upon the basis of the following, Petitioner has reasonable cause to believe that the allegations of the aforesaid Consolidated Complaint and Complaint, and more specifically, those allegations upon which the monetary remedy may be based, are true

and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act for which a monetary remedy will be ordered by the Board, but that the Board's order for such remedy will be frustrated without the temporary injunctive relief sought herein. In support thereof, and of the request for a temporary injunctive relief, Petitioner, upon information and belief, shows as follows:

(A) During the 12-month period ending January 31, 2000, Respondent, a corporation with an office and place of business in Waltham, Massachusetts, herein called Respondent's Waltham facility, was engaged in the business of providing cleaning services for Party-in-Interest Polaroid Corporation (herein called Polaroid) in Waltham, Massachusetts.

(B) During the 12-month period ending January 31, 2000, Respondent, in conducting its business operations described above in paragraph A, performed services valued in excess of $50,000 for Polaroid, an enterprise directly engaged in interstate commerce.

(C) During the 12-month period ending January 31, 2000, Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(D) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(E) During the 12-month period ending January 31, 2000, the following individuals held the positions set forth opposite their respective names and were

supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Emilia Delgado	Owner
Marco A. Delgado	Senior Vice President
Mayra Martínez	Personnel Manager

(F) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cleaning employees, maintenance employees, utility employees and foremen employed by Respondent at its 1277 Main Street, Waltham, Massachusetts facility, but excluding office clerical employees, managerial employees, casual employees, confidential employees, guards, and supervisors as defined in the Act.

(G)(1) On November 24, 1998, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(2) At all times since November 24, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(H)(1) About September 29, 1999, the Union and Respondent reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement.

(2) Since about November 15, 1999, the Union has requested that the Respondent execute a written contract containing the agreement described above in subparagraph H(1).

(3) Since about November 15, 1999, Respondent, by Emilia Delgado and Marco Delgado, has failed and refused to execute the agreement described above in subparagraph H(1).

(I)(1) Since about January 7, 2000, the Union, by letter, has requested that Respondent furnish the Union with the following information about Unit employees:

(a) names;

(b) dates of hire;

(c) schedules of work; and

(d) addresses.

(2) The information requested by the Union, as described above in subparagraph I(1) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(3) Since about January 7, 2000, Respondent, by Marco Delgado, has failed and refused to furnish the Union with the information requested by it as described above in subparagraph I(1).

(J)(1) On about January 31, 2000, Respondent ceased operations.

(2) The subject set forth in subparagraph J(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph J(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

APPENDIX I

(K)(1) Since about mid-January, 2000, Respondent has failed to pay employees their wages.

(2) The subject set forth in subparagraph K(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph K(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(L) By its overall conduct, including the conduct described above in paragraphs H, I, J and K, Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

(M) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6.

As part of the remedy for the unfair labor practices described above, pursuant to the Board's decision in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), at a minimum, the bargaining unit employees will be entitled to two weeks of backpay, or approximately $15,700. Additionally, the bargaining unit employees will be entitled to wages earned in January 2000, or approximately $10,300. The verified affidavit of Compliance Officer Elizabeth Gemperline, explaining said calculation, is attached hereto as Exhibit 6.

7.

(A) **[if applicable:** Polaroid Corporation, (herein called Polaroid) was the Respondent's sole customer. Polaroid currently owes Respondent $54,331.52 for services rendered. Polaroid is scheduled to pay this money to Respondent on March 10, 2000.**]**

(B) On about January 31, 2000, Respondent closed its operations.

(C) The remaining assets of Respondent are uncertain. The Respondent owns no real property, has closed its only office, and has no other customers.

(D) The Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the Region; refused to accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Respondent's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account.

(E) Since the hearing before an administrative law judge is not scheduled to begin until April 3, 2000, it is highly likely that Respondent will have disbursed of or dissipated all assets before a Board decision and order could be enforced by an appropriate circuit court of appeals.

8.

(A) Based on the circumstances described above in paragraph 7, there is imminent danger that substantial and irreparable injury will result to the Unit employees and to the

Board's administrative proceedings if Respondent disperses or dissipates its income in an attempt to avoid its backpay liability under the Act.

(B) Since Respondent has ceased operations, if it disperses the money that it receives from Polaroid, it appears that the Board will have no adequate remedy at law to enforce its remedial order once it becomes final and the amounts of backpay to employees, as specified above, become due and owing. Such actions by Respondent, which may fairly be anticipated, would act to irreparably harm the employee beneficiaries of the prospective Board order, and would thereby nullify or frustrate the remedial order of the Board. A final and binding Board and/or Court order rendered months or years from now will be ineffective to remedy Respondent's unfair labor practices, particularly since Respondent has ceased operations and its only known asset is that money owed to it by Polaroid.

9.

(A) Section 10(j) of the Act, which authorizes the Board to file petitions for temporary injunctive relief, also authorizes this Court to grant such temporary relief, upon the Board's application, as the Court deems just and proper. It appears clear from the circumstances set forth above that unless Respondent and its agents are restrained from dissipating or dispersing its present assets, and any income or assets it may receive in the future, unless and until they discharge any backpay liability caused by their unfair labor practices, pending the Court's disposition of the merits of the Petition, any prospective Board order and court judgment thereon may well be frustrated and rendered impossible of compliance.

(B) Upon information and belief it may be fairly anticipated that unless enjoined and restrained in the manner requested herein, Respondent will dissipate any assets which it presently has and will receive in the future, and, thereby, deprive the individual employees, as beneficiaries of the Board's ultimate remedial order, of the money to which they will be entitled and which constitutes backpay.

(C) Upon information and belief, unless Respondent and its agents **[**and Polaroid**]** are immediately enjoined as requested herein, a serious flouting of the Act will continue with the result that enforcement of important provisions of the Act and of public policy embodied therein will be thwarted before Respondent can be placed under legal restraint through regular administrative procedures leading to a Board Order and a Decree of a Court of Appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Sec. 160(e) or (f). Unless injunctive relief is immediately obtained, it may be fairly anticipated that Respondent will dissipate or disperse its present income and assets as well as any future income and assets it receives, with the result that the affected employees will be denied their statutory rights to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(D) Respondent **[**and Party-in-Interest Polaroid**]** were informed by Petitioner at 2:00 p.m. and 1:45 p.m., respectively, on March 7, 2000, that this Petition for Temporary Injunction and the Motion For Temporary Restraining Order in this matter would be filed on March 8, 2000, and that Petitioner was seeking the Court to order Respondent to deposit $32,202.80, an amount sufficient to cover the minimum backpay liability, plus estimated interest, into the registry of the Court pending the final disposition of the

matters involved herein before the Board. As of the filing of the Petition herein, Respondent has not contacted Petitioner.

(E) Upon information and belief, to avoid the serious results referred to in paragraphs 8 and 9 (A) through (C), it is essential, just and proper, and appropriate for the purposes of effectuating the remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, and in accordance with the purposes of Section 10(j) of the Act, that pending final disposition of the administrative matters involved pending before the Board, Respondent be enjoined and restrained from the dissipation or dispersal of assets, as described above, and that the Court grant such other and further injunctive relief as it may deem appropriate.

10.

The relief prayed for herein has not been previously requested.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court issue an order directing Respondent to promptly file an answer to the allegations of this Petition and to appear before this Court, at a time and place designated by this Court, and show cause, if any there be, why a temporary injunction should not issue, enjoining and restraining Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof from:

(a) in any manner or by any means distributing, transferring or otherwise disposing of assets or funds of Respondent including any income or assets which may be received in the future, except that Respondent may sell or transfer said assets for full, fair,

present consideration, provided that the receipts from any such sale or transfer shall, immediately upon receipt, be deposited in the registry of the United States District Court for the District of Massachusetts until the total amount deposited in that Court's registry in connection with this case shall equal $32,202.80, to protect the backpay claims created by the unfair labor practices which may be found by the Board and the Court of Appeals;

(b) unless and until the sum of $32,202.80 is set aside and retained, in any manner or by any means entering into any arrangement or agreement providing for, or which would result in, a lien on any of Respondent's current assets or income, or pledging as security or encumbering any of its current assets or income;

(c) unless and until the sum of $32,202.80 is set aside and retained, distributing any of the Respondent's assets, or income, or divestment thereof, to shareholders, officers or directors of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with Respondent without further order of this Court;

(d) concealing, altering or destroying any of Respondent's financial documents.

(2) That the Court further order Respondent and any person, natural or corporate, having notice of this order and holding funds or proceeds for Respondent's credit, **[**including Polaroid,**]** to deposit said funds in the registry of the United States District Court, until the total amount deposited in the registry of the Court in connection with this case shall equal $32,202.80, pending the Court's ruling on the merits of Petitioner's request for an injunction and further directs that they stop payment on any checks issued to Respondent as of February 15, 2000.

(3) That the Court further order Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof, to:

(a) immediately based on the income and assets it presently has and from any income and assets it receives in the future, deposit in the registry of the Court, the total amount of $32,202.80, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof;

(b) serve a copy of the temporary injunction upon any person, natural or corporate, to whom Respondent proposes to sell, lease, transfer or otherwise disperse any of its assets, and upon any person, natural or corporate, holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets;

(c) keep, and make available to Petitioner, upon request, for inspection and copying, written records of each and every transaction involving receipts or expenditures in excess of $250.00 by Respondent;

(d) keep and make available to the Petitioner, upon request, for inspection and copying, all financial records and all records kept in the normal course of business by any corporation or entity under Respondent's control;

(e) within 21 days of the issuance of a temporary injunction, file with the Court a sworn and notarized affidavit setting forth the actions Respondent has taken to comply with the Court's Order, and serve a copy of said affidavit upon the Petitioner.

(4) That upon return of said order to show cause, the Court issue an order temporarily enjoining and restraining Respondent in the manner set forth above pending final disposition of the administrative proceedings now pending before the Board in NLRB Cases 1-CA-37811, 1-CA-37828, 1-CA-37875 and 1-CA-37931.

(5) That the Court grant such other and further temporary relief that may be deemed just and proper.

(6) That the Court grant expedited consideration to this Petition, in accordance with 28 U.S.C. 1657(a) and the remedial purposes of Section 10(j) of the Act.

Dated this 8th day of March, 2000 at Boston, Massachusetts.

_____

Acting Regional Director, Region 1
National Labor Relations Board
10 Causeway Street, 6th Floor
Boston, Massachusetts 02222

LEONARD PAGE, General Counsel
BARRY J. KEARNEY, Associate General Counsel
ELLEN A. FARRELL, Assistant General Counsel
ROSEMARY PYE, Regional Director
PAUL J. RICKARD, Assistant to the Regional Director
SARA R. LEWENBERG, Counsel for Petitioner

APPENDIX I

APPENDIX I-4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

****

RONALD S. COHEN, Acting Regional Director
of the First Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.,

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

****

MOTION FOR TEMPORARY RESTRAINING ORDER PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160 (J)] [, AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]][1]

To the Honorable, the Judges of the United States District Court, District of Massachusetts:

Comes now Ronald S. Cohen, Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 29 U.S.C. Sec. 160 (j); herein called the Act) **[**, and the All Writs Act, 28 U.S.C. Section 1651(a),**]** for a temporary restraining order, pursuant to Fed. R. Civ. P. 65(b) pending the final disposition of the matters involved herein pending before

[1] **[The All Writs Act applies only when the Region is authorized to enjoin a third party that is not a party to the underlying unfair labor practice case.]**

the Board on an administrative consolidated complaint of the General Counsel of the Board charging that Estoril Cleaning Co., Inc., (herein called Respondent or Estoril) has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. Sec. 158 (a)(1) and (5). In support thereof, Petitioner respectfully shows as follows:

1.

Petitioner is the Acting Regional Director of the First Region of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the Respondent is invoked pursuant to Section 10(j) of the Act.

3.

(A) On or about the dates set forth below in subparagraphs (1)-(4), Service Employees International Union, Local 254, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) The charge in Case 1-CA-37811 was filed by the Union on January 6, 2000, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(2) A charge and a first amended charge in Case 1-CA-37828 were filed by the Union on January 14, 2000 and February 17, 2000, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case 1-CA-37875 was filed by the Union on February 8, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(4) The charge in Case 1-CA-37931 was filed by the Union on February 24, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5).

(B) Based upon the charges filed in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, and after investigation of the aforesaid charges in which Respondent was given the opportunity to present evidence and legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Estoril on February 28, 2000. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by engaging in certain conduct including, *inter alia*, refusing to execute an agreed upon collective-bargaining agreement; failing and refusing to provide relevant information which was requested by the Union; and failing and refusing to bargain over the effects on unit employees of Respondent's decision to close its operations. (Copies of the foregoing charges and the Consolidated Complaint are attached hereto and are made a part hereof as Exhibits Nos. (1) (a)-(d) and (2), respectively.)

(C) Based upon the charge filed in Case 1-CA-37931, and after investigation of aforesaid charge in which Respondent was given the opportunity to present evidence and

legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued a Complaint and Notice of Hearing (herein called the Complaint) and a Second Order Consolidating Cases against Estoril on March 7, 2000. The Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to pay employees for hours worked in January 2000. (Copies of the foregoing Charge, the Complaint, and the Second Order Consolidating Cases are attached hereto and are made a part hereof as Exhibits Nos. (3), (4), and (5) respectively.)

4.

(A) A hearing on the allegations in the Consolidated Complaint and the Complaint described in paragraphs 3(B) and 3(C) above is scheduled to be held before an administrative law judge of the Board on April 3, 2000.

(B) Counsel for the General Counsel seeks in this pending administrative proceeding an order against the Respondent from the Board, pursuant to Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), which will include a monetary remedy of backpay as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as well as wages due for work performed by the bargaining unit employees described in paragraph 5(F) below in January 2000.

5.

Upon the basis of the following, Petitioner has reasonable cause to believe that the allegations of the aforesaid Consolidated Complaint and Complaint, and more specifically, those allegations upon which the monetary remedy may be based, are true

and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act for which a monetary remedy will be ordered by the Board, but that the Board's order for such remedy will be frustrated without the temporary restraining order sought herein. In support thereof, and of the request for a temporary restraining order, Petitioner, upon information and belief, shows as follows:

(A) During the 12-month period ending January 31, 2000, Respondent, a corporation with an office and place of business in Waltham, Massachusetts, herein called Respondent's Waltham facility, was engaged in the business of providing cleaning services **[**for Party-in-Interest Polaroid Corporation (herein called Polaroid)**]** in Waltham, Massachusetts.

(B) During the 12-month period ending January 31, 2000, Respondent, in conducting its business operations described above in paragraph A, performed services valued in excess of $50,000 for Polaroid, an enterprise directly engaged in interstate commerce.

(C) During the 12-month period ending January 31, 2000, Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(D) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(E) During the 12-month period ending January 31, 2000, the following individuals held the positions set forth opposite their respective names and were

supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Emilia Delgado	Owner
Marco A. Delgado	Senior Vice President
Mayra Martínez	Personnel Manager

(F) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cleaning employees, maintenance employees, utility employees and foremen employed by Respondent at its 1277 Main Street, Waltham, Massachusetts facility, but excluding office clerical employees, managerial employees, casual employees, confidential employees, guards, and supervisors as defined in the Act.

(G)(1) On November 24, 1998, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(2) At all times since November 24, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(H)(1) About September 29, 1999, the Union and Respondent reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement.

(2) Since about November 15, 1999, the Union has requested that the Respondent execute a written contract containing the agreement described above in subparagraph H(1).

(3) Since about November 15, 1999, Respondent, by Emilia Delgado and Marco Delgado, has failed and refused to execute the agreement described above in subparagraph H(1).

(I)(1) Since about January 7, 2000, the Union, by letter, has requested that Respondent furnish the Union with the following information about Unit employees:

(a) names;

(b) dates of hire;

(c) schedules of work; and

(d) addresses.

(3) The information requested by the Union, as described above in subparagraph I(1) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(3) Since about January 7, 2000, Respondent, by Marco Delgado, has failed and refused to furnish the Union with the information requested by it as described above in subparagraph I(1).

(J)(1) On about January 31, 2000, Respondent ceased operations.

(2) The subject set forth in subparagraph J(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph J(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(K)(1) Since about mid-January, 2000, Respondent has failed to pay employees their wages.

(2) The subject set forth in subparagraph K(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph K(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(L) By its overall conduct, including the conduct described above in paragraphs H, I, J and K, Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act. (M) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6.

As part of the remedy for the unfair labor practices described above, pursuant to the Board's decision in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), at a minimum, the bargaining unit employees will be entitled to two weeks of backpay, or approximately $15,700. Additionally, the bargaining unit employees will be entitled to wages earned in January 2000, or approximately $10,300. The verified affidavit of Compliance Officer Elizabeth Gemperline, explaining said calculation, is attached hereto as Exhibit 6.

7.

(A) **[if applicable:** Party-in-Interest Polaroid Corporation, (herein called Polaroid) was the Respondent's sole customer. Polaroid currently owes Respondent $54,331.52 for services rendered. Polaroid is scheduled to pay this money to Respondent on March 10, 2000.**]**

(B) On about January 31, 2000, Respondent closed its operations.

(C) The remaining assets of Respondent are uncertain. The Respondent owns no real property, has closed its only office, and has no other customers.

(D) The Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the Region; refused to accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Respondent's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account.

(E) Since the hearing before an administrative law judge is not scheduled to begin until April 3, 2000, it is highly likely that Respondent will have disbursed of or dissipated all assets before a Board decision and order could be enforced by an appropriate circuit court of appeals.

8.

(A) Based on the circumstances described above in paragraph 7, there is imminent danger that substantial and irreparable injury will result to the unit employees and to the

Board's administrative proceedings if Respondent disperses or dissipates its income in an attempt to avoid its backpay liability under the Act.

(B) Since Respondent has ceased operations, if it disperses the money that it receives **[**from Polaroid**]**, it appears that the Board will have no adequate remedy at law to enforce its remedial order once it becomes final and the amounts of backpay to employees, as specified above, become due and owing. Such actions by Respondent, which may fairly be anticipated, would act to irreparably harm the employee beneficiaries of the prospective Board order, and would thereby nullify or frustrate the remedial order of the Board. A final and binding Board and/or Court order rendered months or years from now will be ineffective to remedy Respondent's unfair labor practices, particularly since Respondent has ceased operations and its only assets being **[**that money owed to it by Polaroid.**]**

9.

(A) Section 10(j) of the Act, which authorizes the Board to file petitions for temporary injunctive relief, also authorizes this Court to grant such temporary relief, upon the Board's application, as the Court deems just and proper. It appears clear from the circumstances set forth above that unless Respondent and its agents are restrained from dissipating or dispersing its present assets, and any income or assets it may receive in the future, unless and until they discharge any backpay liability caused by their unfair labor practices, pending the Court's disposition of the merits of the Petition, any prospective Board order and court judgment thereon may well be frustrated and rendered impossible of compliance.

(B) Upon information and belief it may be fairly anticipated that unless enjoined and restrained in the manner requested herein, Respondent will dissipate any assets which it presently has and will receive in the future and thereby deprive the individual employees, as beneficiaries of the Board's ultimate remedial order, of the money to which they will be entitled and which constitutes backpay.

(C) Upon information and belief, unless Respondent and its agents **[**and Polaroid**]** are immediately enjoined as requested herein, a serious flouting of the Act will continue, with the result that enforcement of important provisions of the Act and of public policy embodied therein will be thwarted before Respondent can be placed under legal restraint through regular administrative procedures leading to a Board Order and a Decree of a Court of Appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Sec. 160(e) or (f). Unless injunctive relief is immediately obtained, it may be fairly anticipated that Respondent will dissipate or disperse its present income and assets as well as any future income and assets it receives, with the result that the affected employees will be denied their statutory rights, to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(D) Respondent **[**and Polaroid**]** was **[**were**]** informed by Petitioner at 2:00 p.m. and 1:45 p.m., respectively, on March 7, 2000, that this Motion For Temporary Restraining Order and the Petition for Temporary Injunction in this matter would be filed on March 8, 2000, and that Petitioner was seeking the Court to order Respondent to deposit $32,202.80, an amount sufficient to cover the minimum backpay liability, plus estimated interest, into the registry of the Court pending the final disposition of the matters involved herein before the Board. As of the filing of the Motion herein,

Respondent has not contacted Petitioner. **[**Polaroid has been notified that Petitioner is seeking a Temporary Restraining Order requiring Polaroid to hold all monies due and owing to Respondent pending this Court's hearing on the merits of Petitioner's request for a temporary injunction.**]**

(E) Upon information and belief, to avoid the serious results referred to in paragraphs 8 and 9 (A) through (C), it is essential, just and proper, and appropriate for the purposes of effectuating the remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, and in accordance with the purposes of Section 10(j) of the Act, that pending final disposition of the administrative matters involved pending before the Board, Respondent be enjoined and restrained from the dissipation or dispersal of assets, as described above, and that the Court grant such other and further injunctive relief as it may deem appropriate.

10.

The relief prayed for herein has not been previously requested.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court immediately execute Petitioner's proposed Order to Show Cause and thereby cause notice of this Petition to be served upon Respondent **[**and Polaroid**]** consistent with the provisions of Section 10(j);

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REQUEST FOR ORAL ARGUMENT

(2) That the Court hold a hearing on Petitioner's request for a temporary restraining order on March 8, 2000, or as soon thereafter as counsel may be heard, and thereupon, pending its consideration of the merits of this Petition, issue a temporary restraining order forthwith enjoining and restraining Respondent, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days duration as provided for in Rule 65(b) of the Federal Rules of Civil Procedure, from:

(A) in any manner or by any means, selling, transferring, dissipating, distributing, dispersing or otherwise disposing of any of Respondent’s assets or funds, in the disposition of its business, including, but not limited to, equipment used to carry out Respondent’s business, finished products, accounts receivable, and monies deposited in Respondent’s bank accounts, any income or assets which may be received in the future, or incurring any liens on its assets, except as they may be required to do so pursuant to any lien of record recorded prior to the filing of the charges herein, and further provided that Respondent may sell or transfer assets for a full, fair, and present consideration actually paid Respondent, provided that the proceeds for any such sale or transfer shall immediately upon receipt be deposited intact and not disbursed except to the extent that it is necessary to do so to pay bona fide current business expenses such as rent, utilities, maintenance, insurance, legal fees and expenses, or to satisfy bona fide liens of records and judgments of record which were recorded prior to the filing of the charges herein, in the registry of the United States District Court for the District of Massachusetts until the total amount deposited in the Court's registry in connection with this case shall equal

$32,202.80; provided further that Respondent shall keep, and make available to the Board upon request for inspection and copying, written records of each and every transaction involving expenditures or receipts by Respondent in excess of $250.

(B) distributing its assets or the proceeds from the sale or divestment thereof, to officers, principals, shareholders or directors of Respondent, or to any other person, entity or enterprise controlled by or related to or affiliated with, Respondent or its shareholders, officers or directors, including the repayment of loans to Respondent, or for the payment of unreasonable salaries to Respondent's officers, shareholders, or directors or their relatives, without further order of the Court.

(C) concealing, altering or destroying any of its financial documents.

(3) That the Court further order Respondent to deposit said funds in the registry of the United States District Court, until the total amount deposited in the registry of the Court in connection with this case shall equal $32,202.80, pending the Court's ruling on the merits of Petitioner's request for an injunction.

(4) That the Court further order Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof, to:

(A) Immediately, based on the income and assets it presently has and from any income and assets it receives in the future, deposit in the registry of the Court, the amount of $32,202.80, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof.

(B) Serve a copy of the temporary injunction upon any person, natural or corporate, to whom Respondent proposes to sell, lease, transfer or otherwise disperse any of its assets, and upon any person, natural or corporate, holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets.

(5) **[if applicable:** That the Court enjoin Polaroid from disbursing any sums or money owed Respondent, and further that the Court order Polaroid to stop payment on any unpaid checks issued to Respondent on or after February 15, 2000, pending the Court's ruling on the merits of Petitioner's request for a temporary injunction.**]**

(6) That the Court issue an order directing Respondent to promptly file an answer to the allegations of the Petition for Temporary Injunction and to appear before this Court, at a time and place designated by this Court, and show cause, if any there be, why a temporary injunction should not issue, extending and incorporating the terms of the temporary restraining order and further enjoining and restraining Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof as prayed for in said Petition.

(7) That upon return of said order to show cause, the Court issue an order temporarily enjoining and restraining Respondent in the manner set forth above and in the Petition for Temporary Injunction pending final disposition of the administrative proceedings now pending before the Board in NLRB Cases 1-CA-37811, 1-CA-37828, 1-CA-37875 and 1-CA-37931.

(8) That the Court grant such other and further temporary relief that may be deemed just and proper.

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(9) That the Court grant expedited consideration to this Petition, in accordance with 28 U.S.C. 1657(a) and the remedial purposes of Section 10(j) of the Act.

Dated this 8th day of March, 2000 at Boston, Massachusetts.

_____
Acting Regional Director, Region One
National Labor Relations Board
10 Causeway Street, 6th Floor
Boston, Massachusetts 02222

LEONARD PAGE, General Counsel
BARRY J. KEARNEY, Associate General Counsel
ELLEN A. FARRELL, Assistant General Counsel
ROSEMARY PYE, Regional Director
PAUL J. RICKARD, Assistant to the Regional Director
SARA R. LEWENBERG, Counsel for Petitioner

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APPENDIX I-5

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of the Twenty-Ninth Region
of the National Labor Relations Board,
for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK, INCORPORATED

Respondent

****

ORDER GRANTING TEMPORARY RESTRAINING ORDER PURSUANT TO 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160(j)] AND FED.R.CIV.P. 65(b)

The Petition of Alvin Blyer, Regional Director of the Twenty-Ninth Region of the National Labor Relations Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for a temporary restraining order against Unitron Color Graphics of New York, Incorporated, also known as LIC Group, Inc. (herein called Respondent) and for an order directing said Respondent to show cause why a temporary injunction should not be granted as prayed for in said petition; the petition being verified and supported by an affidavit and exhibits; and after said Petition was duly served upon the Respondent and Respondent having had an opportunity to be present at a hearing on Petitioner's request for a temporary restraining order,

IT APPEARING to the Court from said verified Petition, affidavits, exhibits, and legal memoranda as well as the evidence and argument presented by Respondent that:

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1.

Petitioner is the Regional Director of the Twenty-Ninth Region of the Board, an agency of the United States Government, and has filed this petition for and on behalf of the Board which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the parties has been properly invoked by Petitioner pursuant to Section 10(j) of the Act, and Fed.R.Civ.P. 65(b).

3.

(A) On or about the dates set forth below in subparagraphs (1)-(3), Technical, Office and Professional Union, Local 2110, United Automobile Agricultural Implement and Aerospace Workers, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) A charge and a first amended charge in Case No. 29-CA-18119 were filed by the Union on April 11, 1994 and May 26, 1994, respectively, alleging that Respondent had engaged in violations of Section 8(a)(1) and (3) of the Act.

(2) The charge in Case No. 29-CA-18381 was filed by the Union on July 6, 1994, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case No. 29-CA-18421 was filed by the Union on July 18, 1994, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

4.

The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

5.

(A) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 3 and 4, the Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Unitron Color Graphics of New York Incorporated (herein called Respondent) on August 31, 1994 in Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1), (3) and (5) of the Act by engaging in certain conduct including, *inter alia*, circulating among its employees a petition to decertify the Union and urging said employees to sign the petition; promising employees better benefits if they signed the petition, abandoned their membership in the Union and refrained from engaging in union activities; threatening employees with a reduction in hours and layoffs and issuing disciplinary warning letters to its employee/shop steward Adonica Hull because they engaged in Union activities; failing and refusing to provide relevant information which was requested by the Union and failing and refusing to bargain in good faith over the effects on unit employees of Respondent's decision to close its facility.

(B) In disposition of Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421, Respondent and the Union entered into an informal settlement agreement, which was

approved by the Regional Director for Region 29 on June 26, 1996. The settlement agreement provided that Respondent would, *inter alia*, bargain over the effects upon its bargaining unit employees of its decision to close its facility.

6.

(A) A charge and a first amended charge in Case No. 29-CA-20680 were filed by the Union on January 31, 1997, and April 28, 1997, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(B)The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

(C) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 6(A) and (B), an Acting Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Revoking Informal Settlement Agreement, Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (herein called the Amended Consolidated Complaint) in Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680, alleging as violations of the Act, the pre-settlement conduct set forth in the Consolidated Complaint, as described above in paragraph 5(A), and additionally alleging that Respondent failed and refused to furnish the Union with certain requested information, and that Respondent bargained in bad faith by (1) expressing strong disdain for the Union representative and the Union's effects bargaining proposals; (2) evidencing a closed-mindedness to the Union's proposals; (3) failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and (4) failing and

refusing to provide certain information, and that by such conduct it failed to comply with and violated the terms of the settlement agreement described above in paragraph 5(B) above.

(D) The Regional Director seeks, in the administrative complaint proceeding described in paragraph 6(C) above, as part of a final remedial order against the Respondent, that the Board order, under Section 10(c) of the Act, 29 U.S.C. Section 160(c), a make-whole remedy for the affected employees who were the victims of Respondent's alleged violations, which order shall require, as a minimum, two weeks of pay for all of Respondent's employees previously represented by the Union.

7.

(A) At all material times, Respondent was a New York corporation, with its principal office and place of business located at 47-10 32nd Place, Long Island City, New York, where it was engaged in performing pre-press color graphics production services for magazines, and related services.

(B) During the past year, a period representative of all times material herein, Respondent, in the course and conduct of its business operations described above in paragraph 7(A), performed services valued in excess of $50,000 for various enterprises located in the State of New York, each of which enterprises, in turn, is directly engaged in interstate commerce and satisfies a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow.

(C) Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, 29 U.S.C. Sec. 152(2), (6) and (7).

(D) The Union, is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. Sec. 152(5).

(E) There is and Petitioner has demonstrated reasonable cause to believe that:

(1) Since on or about April 13, 1994, May 16 and June 29, 1994 Respondent failed and refused to bargain collectively in a timely manner with the Union regarding the effects upon unit employees of Respondent's decision to sell its business.

(2) The subject set forth in paragraph (E)(1) relates to the wages, hours and other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining.

(3) Since on or about May 16, 1994 and May 31, 1994, Respondent failed and refused to furnish, or delayed in furnishing, the Union with certain relevant information requested by the Union.

(4) By the acts described above in paragraphs E(1)-(3), Respondent has failed and refused to bargain collectively, and in good faith with the exclusive collective bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

8.

There is and Petitioner has reasonable cause to believe that Respondent, in violation of the terms of the settlement agreement described above in paragraph 5(B) above, engaged in the following conduct:

(1) Respondent failed and refused to furnish the Union with certain relevant information requested by the Union in letters dated November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997.

(2) Respondent negotiated in bad faith with the Union regarding the effects of its decision to close its Long Island City, New York facility upon its bargaining unit employees by its overall conduct including:

(a) on or about September 12, 1996, expressing strong disdain for the Union representative and the Union's effects bargaining proposals, evidencing a closed-mindedness to the Union's proposals;

(b) since on or about September 12, 1996, failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and

(c) since on or about November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997, failing and refusing to provide and delaying in providing certain information described above.

9.

There is and Petitioner has reasonable cause to believe that Respondent's asset purchaser, Applied Graphics Technologies, L.P., herein called AGT, makes monthly commission payments to Respondent pursuant to a May 10, 1994 Asset Purchase Agreement, but that these commissions will end in May 1998.

10.

There is and Petitioner has reasonable cause to believe that since Respondent discontinued its operations in May of 1994, was dissolved by proclamation on September 24, 1997, because of non-payment of taxes and has not responded to the request of the Regional Office that it voluntarily sequester an amount sufficient to cover the backpay remedy as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), that

Respondent will dissipate any income earned from AGT and any other sources pending final disposition of the matters involved herein before the Board.

11.

(A) Unless immediate protection is granted to Petitioner pursuant to Fed.R.Civ.P. 65(b) requiring Respondent to set aside sufficient assets and income so as to prevent the imminent dissipation or dispersal of Respondent's assets and income, a frustration to the ultimate administrative order of the Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 will result.

(B) There is imminent danger that substantial and irreparable injury will unavoidably result to Petitioner's enforcement of the Act in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 and that the Board's administrative order will be frustrated if protection is not granted with a temporary restraining order pending a final adjudication by the Court of the merits of the Board's Petition for a temporary injunction.

NOW, THEREFORE, BASED UPON THE ABOVE, IT IS HEREBY ORDERED, that effective the _____ day of March, 1998, at ____.m., Respondent, its principals, officers, agents, attorneys, servants, employees, successors and assigns, and all persons natural or corporate acting in concert or participation with Respondent be, and they hereby are,

(A) ENJOINED AND RESTRAINED until , 1998, at , and no longer without further order of this Court from:

(1) In any manner selling, leasing, transferring, assigning, paying over, alienating, dissipating or otherwise disposing of any and all of Respondent's assets, including but not limited to real property, buildings and fixtures, leasehold interests,

equipment or vehicles used to carry out Respondent's business, accounts receivable, monies on hand, monies that will be received in the future, or monies presently deposited in Respondent's bank or brokerage accounts, unless and until Respondent first furnish security in the amount of $23,046.40 by depositing the sum of $23,046.40 in the registry of the United States District Court for the Eastern District of New York to protect the claims created by their alleged unfair labor practices as set forth in the Acting Regional Director's Amended Consolidated Complaint in NLRB Cases 29-CA-18119; 29-CA-18381; 29-CA-18421; 29-CA-20680, *PROVIDED HOWEVER,* Respondent may sell, transfer or lease assets in bona fide arms length transactions for a full, fair and present consideration or rental value actually paid to Respondent, provided that the receipts from any such sale or transfer, and the rents due pursuant to any such lease shall immediately upon receipt be deposited in the registry of the United States District Court for the Eastern District of New York until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; *PROVIDED FURTHER,* that Respondent shall keep, and make available to the Board upon request, for inspection and copying, written records of each and every transaction involving expenditures or receipts by Respondent in excess of $100.

(2) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, in any manner or by any means entering into any arrangement or agreement providing for or which would result in, a lien on any of Respondent's current assets or income or pledging any of its current assets or income as security or encumbering any of its other current assets without further order of this Court.

(3) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, distributing any of Respondent's income or assets, or the proceeds from the sale, lease or divestment thereof, to the officers, principals, shareholders or directors of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, including the repayment of loans to Respondent or for the payment of unreasonable salaries to Respondent's officers, shareholders or directors or their relatives, without further order of this Court;

(4) In any manner of by any means concealing, misplacing, altering or destroying any of Respondent's financial correspondence, books, records, federal, state and local tax returns, bank or brokerage house statements, or other financial documents.

(B) Affirmatively Ordered and Directed to:

(1) immediately, based on the income and assets it presently has, and from any income and assets it receives in the future, deposit in the registry of the Court, the total amount of $23,046.40, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof.

(2) notwithstanding any other provision of this order, proceeds of the sale, transfer, lease or other disposition of Respondent's assets for a full fair and present consideration or rental value, may be applied to bona fide current expenses including federal, state, county and local taxes, and the satisfaction of bona fide liens of record recorded prior to the entry of this order, provided however, that in no event shall any payment be made to any officer, principal, shareholder or director of Respondent, or to

any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, absent further order of this Court.

(3) provide notice of this order, in writing, to any person natural or corporate to whom Respondent proposes to sell, lease, transfer or otherwise disperse of any of its assets or to any person, natural or corporate holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets; copies of such notices shall be promptly provided to the Board.

II. IT IS FURTHER ORDERED that any person, natural or corporate, having notice of this order and holding funds for credit of Respondent, including Applied Graphics Technologies, L.P., is directed to deposit said funds in the registry of the United States District Court for the Eastern District of New York, until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; and it is further directed that they stop payment on any checks issued to Respondent as of _March 6_, 1998.

III. IT IS FURTHER ORDERED that service of a copy of this order, when it is issued, be made forthwith by the United States Marshal or an agent of the Board, 21 years of age or older, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts, or by registered mail, upon Respondent, Applied Graphics Technologies, L.P. and the Charging Party before the Board, and that such proof of such service be filed with the Court.

ORDERED this _____ day of _____, 1998, at Brooklyn, New York.

BY THE COURT:

_____
United States District Judge

APPENDIX I

APPENDIX I-6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WILLIAM A. PASCARELL, Regional Director of Region 22 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	*	
Petitioner,	*	
v.	*	Civil No.
ALPINE FASHIONS, INC.,	*	
Respondents.	*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR ISSUANCE OF TEMPORARY INJUNCTION PURSUANT TO 29 U.S.C. Section 160(j)

This case was heard upon the verified petition, as amended, of William A. Pascarell, Regional Director of Region 22 of the National Labor Relations Board ("the Board"), for a temporary [restraining order and] injunction against Alpine Fashions, Inc. ("the Respondent") pursuant to Section 10(j) of the National Labor Relations Act as amended ("the Act"), 61 Stat. 149, 29 U.S.C. Section 160(j), pending the final disposition of the matters which are now before the Board in NLRB Case 22-CA-14948, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in the petition. [No answer was filed by the Respondent.] In a hearing on the issues raised by the petition, the Court has received and fully considered the testimony of witnesses and evidence presented by the parties. Based upon the petition, testimony of

witnesses, exhibits of the parties, the briefs and argument of counsel and the entire record, the Court makes the following:

FINDINGS OF FACT

1.

Petitioner is the Regional Director for Region 22 of the Board, an agency of the United States, and properly filed the petition for and on behalf of the Board.

2.

On or about March 26, 1987 Local 162, International Ladies Garment Workers Union, AFL-CIO, ("the Union"), pursuant to the provisions of the Act, filed with the Board a charge in Case 22-CA-14948 alleging that Respondent had engaged in violations of Section 8(a) (1) and (5) of the Act.

3.

That charge was referred to the Petitioner for investigation.

4.

Based upon the charge, and after an impartial investigation, the General Counsel of the Board, on behalf of the Board, by the Regional Director for the Board's Region 22, pursuant to Section 10(b) of the Act, on or about May 22 and May 28, 1987 issued a complaint and amended complaint as described below, alleging that Respondent had engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by failing to transmit to the Union dues withheld from the wages of its employees, failing to make pension and welfare contributions required by its collective-bargaining agreement with the Union, failing to furnish the Union with information about

its imminent cessation of operations, and failing and refusing to bargain with the Union with respect to the effect upon its employees of its cessation of its operations.

5.

On June 4, 1987, after securing authorization from the Board, Petitioner filed a petition with this Court pursuant to Section 10(j) of the Act, 29 U.S.C. Section 160(j), seeking a temporary restraining order and injunction against Respondent. The Court caused the petition, its attachments and exhibits to be duly served on the Respondent.

6.

There is, and Petitioner has, reasonable cause to believe that:

(A) At all material times Respondent is, and has been, a corporation with a facility located in North Bergen, New Jersey ("the facility"), where it is engaged in the manufacture of clothing.

(B) During the past 12 months, which period is representative of all material times, Respondent, in the course and conduct of its business operations as described in Findings of Fact, paragraph 9(A) above, purchased and received goods and materials valued in excess of $50,000 which were shipped to Respondent's facility directly from points outside the State of New Jersey,

(C) Respondent is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act, engaged in commerce or an industry affecting commerce within the meaning of Section 2(2) and (7) of the Act.

(D) At all material times, John Pandolfi has been and is a supervisor of Respondent within the meaning of Section 2(11) of the Act, and/or an agent of Respondent within the meaning of Section 2(13) of the Act.

APPENDIX I

(E) 1) The Union is a labor organization within the meaning of Section 2(5) of the Act.

2) About October, 1986, a majority of Respondent's production and maintenance employees designated and selected the Union as their exclusive representative for the purposes of collective bargaining.

(F) Since on or about October 20, 1986, and at all material times, the Union, by virtue of Section 9(a) of the Act, has been the designated exclusive collective-bargaining representative of Respondent's production and maintenance employees and, since that date, the Union has been recognized as such representative by Respondent.

(G) Since October 20, 1986, Respondent has been an employer-member of the Association of Rain Apparel Contractors, Inc. ("the Association"), and has authorized the Association to bargain collectively on its behalf with the Union and enter into a collective-bargaining agreement concerning wages, hours, and other terms and conditions of employment of its employees.

(H) On or about November 17, 1986, the Association and the Union entered into a collective-bargaining agreement covering Respondent's production and maintenance employees for the period October 20, 1986 to June 30, 1990.

(I) Since on or about January 1, 1987, and continuously thereafter, Respondent has failed and refused to abide by the terms of its collective-bargaining agreement with the Union by failing and refusing to remit to the Union union dues deducted from its employees' wages.

(J) Since on or about February 1, 1987, and continuously thereafter, Respondent has failed and refused to abide by the terms of its collective-bargaining agreement with

the Union by failing and refusing to make scheduled pension and welfare contributions on behalf of its employees.

(K) Since on or about March 2, 1987, and continuously thereafter, Respondent has failed and refused to furnish the Union with information concerning its imminent cessation of operations information which is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of Respondent's employees.

(L) Since on or about March 2, 1987, and continuously thereafter, Respondent has refused to bargain with the Union as the exclusive collective-bargaining representative of its employees with respect to the effects on its employees of Respondent's cessation of its operations.

(M) By each of the acts and conduct described in the Finding of Fact, paragraphs 6(I), (J), (K) and (L) above, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

(N) The acts and conduct of Respondent set forth in the Findings of Fact, paragraphs 6(I), (J), (K) and (L) above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes, burdening and obstructing interstate commerce and the free flow of commerce.

(0) The acts and conduct of Respondent described in the Findings of Fact, paragraphs 6(I), (J), (K) and (L), give rise to potential financial liability under the Act and make Respondent potentially liable for backpay to its employees referred to in the Findings of Fact, paragraphs 6(E)(2) and (F), and for dues, pension, and welfare fund

payments to the Union, referred to in the Findings of Fact, paragraph 6(E), (F), (G) and (H).

7.

On May 4, 12 and 20, 1987, Respondent, through its agent, John Pandolfi, advised Board Agent Donna Tribel that the facility would be closing on or about March 22, 1987, and that an auction would be held shortly thereafter to liquidate any assets. When Tribel asked if Respondent would be willing to set aside an amount of money to cover the monetary liability described in the Findings of Fact, paragraph 6(0) above, Pandolfi agreed to appear in the Board's offices with a certified check on March 22, 1987. However, he failed to keep the appointment. Tribel called Pandolfi on May 26, 1987, at which time Pandolfi told her that the facility had closed on May 22, 1987 and that he had paid the employees any money due them. He refused to answer any further questions. On June 2, 1987, Tribel visited the shop and observed that the operation was continuing. Supervisor Hilda Torres informed Tribel that Respondent was finishing what work it had and that she believed the shop would be closing by the end of the week.. On or about June 5, 1987, by order of the New Jersey Superior Court, possession of the facility was returned to the lessor who then bolted the premises.

8.

It may fairly be anticipated, based upon the circumstances and conduct of Respondent described in paragraph 7 of the Findings of Fact, that Respondent will in fact dissipate or disperse its assets without adequately providing for its potential monetary liability as described in paragraph 6(0) of the Findings of Fact, and thus unjustifiably

deny its employees and the Union any opportunity for backpay, back dues and fund contributions to which they are entitled under the Act.

9.

Unless a temporary sequestration of assets injunction is issued by this Court as requested by Petitioner, Respondent's unfair labor practices will go unremedied, and thus any final order of the Board will be rendered void or meaningless, frustrating the policies and the remedial purposes of the Act.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding, and under Section 10(j) of the Act is empowered to grant temporary injunctive relief.

2. There is, and Petitioner has, reasonable cause to believe that:

(a) Respondent is, and has been at all material times, an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), 2(6) and (7) of the Act.

(b) Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these practices will impair the fundamental policies of the Act, as set forth in Section 1(b) thereof.

(c) The unfair labor practices give rise to and make Respondent liable for backpay to its employees and back dues and pension and welfare fund payments to the Union.

3. Based upon Respondent's conduct described in paragraph 7 of the Findings of Fact, and the circumstances described in paragraphs 8 and 9 of the Findings

of Fact, it is appropriate, just and proper within the meaning of Section 10(j) of the Act that, pending the final disposition of the matters now pending before the Board, Respondent, its officers, agents, servants, employees and attorneys and all persons acting in concert or participation with it or them are hereby enjoined and restrained from dissipating, transferring or dispersing any assets or funds Respondent may have, as set forth in the Order Granting Temporary Injunction, unless and until Respondent discharges any backpay liability caused by its unfair labor practices or, in the alternative, Respondent furnishes security in the amount of $____ by depositing the sum of $_____ in the registry of the United States District Court for the District of New Jersey as described in the Order Granting Temporary Injunction, and is further enjoined and restrained from concealing or destroying Respondent's financial or other business records.

4. In order to ensure compliance with the Court's temporary injunction Order, Respondent is further directed: (a) to provide reasonable access to agents of Petitioner, upon request, for inspection and copying, all its financial correspondence, books, records, federal, state and local tax returns, bank or brokerage house statements, and other business documents set forth in the temporary injunction Order; (b) to grant reasonable access to agents of Petitioner to Respondent's North Bergen, New Jersey facility; and (c) within ten (10) days of the issuance of the Court's temporary injunction Order, to file an affidavit with the Court, serving a copy on the Petitioner, (i) listing and describing all present business assets valued in excess of $250, including their

descriptions, locations, estimated fair market value, and the identities and addresses of all secured creditors having an interest in any such assets, and (ii) stating with specificity what steps Respondent has taken to comply with the terms of the Court's temporary injunction Order.

BY THE COURT:

DATE:

APPENDIX I

APPENDIX I-7

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of the Twenty-Ninth Region
of the National Labor Relations Board,
for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK, INCORPORATED

Respondent

****

ORDER GRANTING TEMPORARY RESTRAINING ORDER PURSUANT TO 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160(j)] AND FED.R.CIV.P. 65(b)

The Petition of Alvin Blyer, Regional Director of the Twenty-Ninth Region of the National Labor Relations Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for a temporary restraining order against Unitron Color Graphics of New York, Incorporated, also known as LIC Group, Inc. (herein called Respondent) and for an order directing said Respondent to show cause why a temporary injunction should not be granted as prayed for in said petition; the petition being verified and supported by an affidavit and exhibits; and after said Petition was duly served upon the Respondent and Respondent having had an opportunity to be present at a hearing on Petitioner's request for a temporary restraining order,

IT APPEARING to the Court from said verified Petition, affidavits, exhibits, and legal memoranda as well as the evidence and argument presented by Respondent that:

APPENDIX I

1.

Petitioner is the Regional Director of the Twenty-Ninth Region of the Board, an agency of the United States Government, and has filed this petition for and on behalf of the Board which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the parties has been properly invoked by Petitioner pursuant to Section 10(j) of the Act, and Fed.R.Civ.P. 65(b).

3.

(A) On or about the dates set forth below in subparagraphs (1)-(3), Technical, Office and Professional Union, Local 2110, United Automobile Agricultural Implement and Aerospace Workers, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) A charge and a first amended charge in Case No. 29-CA-18119 were filed by the Union on April 11, 1994 and May 26, 1994, respectively, alleging that Respondent had engaged in violations of Section 8(a)(1) and (3) of the Act.

(2) The charge in Case No. 29-CA-18381 was filed by the Union on July 6, 1994, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case No. 29-CA-18421 was filed by the Union on July 18, 1994, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

4.

The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

5.

(A) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 3 and 4, the Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Unitron Color Graphics of New York Incorporated (herein called Respondent) on August 31, 1994 in Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1), (3) and (5) of the Act by engaging in certain conduct including, *inter alia*, circulating among its employees a petition to decertify the Union and urging said employees to sign the petition; promising employees better benefits if they signed the petition, abandoned their membership in the Union and refrained from engaging in union activities; threatening employees with a reduction in hours and layoffs and issuing disciplinary warning letters to its employee/shop steward Adonica Hull because they engaged in Union activities; failing and refusing to provide relevant information which was requested by the Union and failing and refusing to bargain in good faith over the effects on unit employees of Respondent's decision to close its facility.

(B) In disposition of Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421, Respondent and the Union entered into an informal settlement agreement, which was

approved by the Regional Director for Region 29 on June 26, 1996. The settlement agreement provided that Respondent would, *inter alia*, bargain over the effects upon its bargaining unit employees of its decision to close its facility.

6.

(A) A charge and a first amended charge in Case No. 29-CA-20680 were filed by the Union on January 31, 1997, and April 28, 1997, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(B)The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

(C) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 6(A) and (B), an Acting Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Revoking Informal Settlement Agreement, Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (herein called the Amended Consolidated Complaint) in Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680, alleging as violations of the Act, the pre-settlement conduct set forth in the Consolidated Complaint, as described above in paragraph 5(A), and additionally alleging that Respondent failed and refused to furnish the Union with certain requested information, and that Respondent bargained in bad faith by (1) expressing strong disdain for the Union representative and the Union's effects bargaining proposals; (2) evidencing a closed-mindedness to the Union's proposals; (3) failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and (4) failing and

refusing to provide certain information, and that by such conduct it failed to comply with and violated the terms of the settlement agreement described above in paragraph 5(B) above.

(D) The Regional Director seeks, in the administrative complaint proceeding described in paragraph 6(C) above, as part of a final remedial order against the Respondent, that the Board order, under Section 10(c) of the Act, 29 U.S.C. Section 160(c), a make-whole remedy for the affected employees who were the victims of Respondent's alleged violations, which order shall require, as a minimum, two weeks of pay for all of Respondent's employees previously represented by the Union.

7.

(A) At all material times, Respondent was a New York corporation, with its principal office and place of business located at 47-10 32nd Place, Long Island City, New York, where it was engaged in performing pre-press color graphics production services for magazines, and related services.

(B) During the past year, a period representative of all times material herein, Respondent, in the course and conduct of its business operations described above in paragraph 7(A), performed services valued in excess of $50,000 for various enterprises located in the State of New York, each of which enterprises, in turn, is directly engaged in interstate commerce and satisfies a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow.

(C) Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, 29 U.S.C. Sec. 152(2), (6) and (7).

(D) The Union, is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. Sec. 152(5).

(E) There is and Petitioner has demonstrated reasonable cause to believe that:

(1) Since on or about April 13, 1994, May 16 and June 29, 1994 Respondent failed and refused to bargain collectively in a timely manner with the Union regarding the effects upon unit employees of Respondent's decision to sell its business.

(2) The subject set forth in paragraph (E)(1) relates to the wages, hours and other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining.

(3) Since on or about May 16, 1994 and May 31, 1994, Respondent failed and refused to furnish, or delayed in furnishing, the Union with certain relevant information requested by the Union.

(4) By the acts described above in paragraphs E(1)-(3), Respondent has failed and refused to bargain collectively, and in good faith with the exclusive collective bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

8.

There is and Petitioner has reasonable cause to believe that Respondent, in violation of the terms of the settlement agreement described above in paragraph 5(B) above, engaged in the following conduct:

(1) Respondent failed and refused to furnish the Union with certain relevant information requested by the Union in letters dated November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997.

(2) Respondent negotiated in bad faith with the Union regarding the effects of its decision to close its Long Island City, New York facility upon its bargaining unit employees by its overall conduct including:

(a) on or about September 12, 1996, expressing strong disdain for the Union representative and the Union's effects bargaining proposals, evidencing a closed-mindedness to the Union's proposals;

(b) since on or about September 12, 1996, failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and

(c) since on or about November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997, failing and refusing to provide and delaying in providing certain information described above.

9.

There is and Petitioner has reasonable cause to believe that Respondent's asset purchaser, Applied Graphics Technologies, L.P., herein called AGT, makes monthly commission payments to Respondent pursuant to a May 10, 1994 Asset Purchase Agreement, but that these commissions will end in May 1998.

10.

There is and Petitioner has reasonable cause to believe that since Respondent discontinued its operations in May of 1994, was dissolved by proclamation on September 24, 1997, because of non-payment of taxes and has not responded to the request of the Regional Office that it voluntarily sequester an amount sufficient to cover the backpay remedy as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), that

Respondent will dissipate any income earned from AGT and any other sources pending final disposition of the matters involved herein before the Board.

11.

(A) Unless immediate protection is granted to Petitioner pursuant to Fed.R.Civ.P. 65(b) requiring Respondent to set aside sufficient assets and income so as to prevent the imminent dissipation or dispersal of Respondent's assets and income, a frustration to the ultimate administrative order of the Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 will result.

(B) There is imminent danger that substantial and irreparable injury will unavoidably result to Petitioner's enforcement of the Act in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 and that the Board's administrative order will be frustrated if protection is not granted with a temporary restraining order pending a final adjudication by the Court of the merits of the Board's Petition for a temporary injunction.

NOW, THEREFORE, BASED UPON THE ABOVE, IT IS HEREBY ORDERED, that effective the _____ day of March, 1998, at ____.m., Respondent, its principals, officers, agents, attorneys, servants, employees, successors and assigns, and all persons natural or corporate acting in concert or participation with Respondent be, and they hereby are,

(A) ENJOINED AND RESTRAINED until , 1998, at , and no longer without further order of this Court from:

(1) In any manner selling, leasing, transferring, assigning, paying over, alienating, dissipating or otherwise disposing of any and all of Respondent's assets, including but not limited to real property, buildings and fixtures, leasehold interests,

equipment or vehicles used to carry out Respondent's business, accounts receivable, monies on hand, monies that will be received in the future, or monies presently deposited in Respondent's bank or brokerage accounts, unless and until Respondent first furnish security in the amount of $23,046.40 by depositing the sum of $23,046.40 in the registry of the United States District Court for the Eastern District of New York to protect the claims created by their alleged unfair labor practices as set forth in the Acting Regional Director's Amended Consolidated Complaint in NLRB Cases 29-CA-18119; 29-CA-18381; 29-CA-18421; 29-CA-20680, *PROVIDED HOWEVER,* Respondent may sell, transfer or lease assets in bona fide arms length transactions for a full, fair and present consideration or rental value actually paid to Respondent, provided that the receipts from any such sale or transfer, and the rents due pursuant to any such lease shall immediately upon receipt be deposited in the registry of the United States District Court for the Eastern District of New York until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; *PROVIDED FURTHER,* that Respondent shall keep, and make available to the Board upon request, for inspection and copying, written records of each and every transaction involving expenditures or receipts by Respondent in excess of $100.

(2) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, in any manner or by any means entering into any arrangement or agreement providing for or which would result in, a lien on any of Respondent's current assets or income or pledging any of its current assets or income as security or encumbering any of its other current assets without further order of this Court.

(3) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, distributing any of Respondent's income or assets, or the proceeds from the sale, lease or divestment thereof, to the officers, principals, shareholders or directors of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, including the repayment of loans to Respondent or for the payment of unreasonable salaries to Respondent's officers, shareholders or directors or their relatives, without further order of this Court;

(4) In any manner of by any means concealing, misplacing, altering or destroying any of Respondent's financial correspondence, books, records, federal, state and local tax returns, bank or brokerage house statements, or other financial documents.

(B) Affirmatively Ordered and Directed to:

(1) immediately, based on the income and assets it presently has, and from any income and assets it receives in the future, deposit in the registry of the Court, the total amount of $23,046.40, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof.

(2) notwithstanding any other provision of this order, proceeds of the sale, transfer, lease or other disposition of Respondent's assets for a full fair and present consideration or rental value, may be applied to bona fide current expenses including federal, state, county and local taxes, and the satisfaction of bona fide liens of record recorded prior to the entry of this order, provided however, that in no event shall any payment be made to any officer, principal, shareholder or director of Respondent, or to

any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, absent further order of this Court.

(3) provide notice of this order, in writing, to any person natural or corporate to whom Respondent proposes to sell, lease, transfer or otherwise disperse of any of its assets or to any person, natural or corporate holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets; copies of such notices shall be promptly provided to the Board.

II. IT IS FURTHER ORDERED that any person, natural or corporate, having notice of this order and holding funds for credit of Respondent, including Applied Graphics Technologies, L.P., is directed to deposit said funds in the registry of the United States District Court for the Eastern District of New York, until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; and it is further directed that they stop payment on any checks issued to Respondent as of March 6, 1998.

III. IT IS FURTHER ORDERED that service of a copy of this order, when it is issued, be made forthwith by the United States Marshal or an agent of the Board, 21 years of age or older, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts, or by registered mail, upon Respondent, Applied Graphics Technologies, L.P. and the Charging Party before the Board, and that such proof of such service be filed with the Court.

ORDERED this _____ day of _____, 1998, at Brooklyn, New York.

BY THE COURT:

_____
United States District Judge

APPENDIX I

APPENDIX I-8

Outline of Short Memo of Points in Support of T.R.O. Request for Protective Order

Note: A separate and *very short, 6-9 page* memo of points should be prepared to support the Region's request for a TRO protective order. A much longer and detailed memo of points should be prepared with the complete "just and proper" analysis from the Model Argument for Protective Order in the "Protective Order Package".

1. Nature of 10(j) proceedings:

Use language from the 10(j) Standards in your circuit. If appropriate, set forth Region's attempts to give prior notice to and official service of petition/exhibits upon the respondent and/or its counsel. It may be necessary to attach an affidavit of a Board agent re notice and service.

2. Summary of Facts

a) short summary of facts, including issuance of Board's administrative complaint.

3. "Reasonable Cause"/"Likelihood of Success on Merits"

a) describe basis for legal conclusion that facts give rise to violations that entail backpay liability under Act, cite one or two key cases on each of merit allegations.

b) note attached affidavit of Regional officer estimating backpay in this case.

4. "Just and Proper" Relief; Need for T.R.O.

a) describe the circumstances that indicate a need to protect the Board's backpay, i.e., a cessation of Respondent's operations and ongoing/imminent liquidation of assets without Respondent's making any provision for the satisfaction of its backpay liability, cite to any attached affidavit or notice of auction, etc.

b) Need to protect potential backpay remedy of Board - Section 10(c) of Act; importance of backpay as remedial device to restore lawful status quo, see *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941), *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 265 (1969).

c) Federal courts have often granted extraordinary injunctions to preserve a defendant's assets that appeared to be in danger of dissipation during a federal administrative proceeding, including the use of Section 10(j) under the NLRA. See, e.g., *Hirsch v. Dorsey Trailers, Inc.,* 147 F.3d 243 (3rd Cir. 1997); *Schaub v. Brewery Products. Inc.,* 7I5 F. Supp. 829 (E.D. Mich. 1989) (Section 10(j)); *Kobel1 v. Menard Fiberglass Products, Inc.,* 678 F. Supp. 1155 (W.D. Pa. 1988) (Section 10(j)); *NLRB v.*

Kellburn Manufacturing Co., Inc., 149 F.2d 686 (2d Cir. 1945) (NLRA Section 10(e)). See generally *SEC v. Bartlett*, 422 F.2d 475 (8th Cir. 1970); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th dr. 1982), cert. denied 456 U.S. 973; *FSLIC v. Sahni*, 868 F.2d 1096 (9th Cir. 1989).

d) District Court can grant T.R.O. under Section 10(j) and Fed. R. Civ. P. 65(b), see *Squillacote v. Local 248, Meat and Allied Food Workers*, 534 F.2d 735, 743 (7th Cir.. 1976). Such TROs can be granted to sequester assets and prevent the destruction of a respondent's books and records. See *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 671 (S.D.N.Y. 1979); cite also to attached copies of 10(j) "protective order" TROs, like *BGB Construction, Milwaukee Terminal, Yellowstone*, and *New Hope Industries* (copies available from ILB).

APPENDIX I

APPENDIX I-9

Model Argument for "Protective Order" or Sequestration of Assets Injunctions Under Section 10(j) [29 U.S.C. Section 160(j)]

Your memorandum of points and authorities should set forth in the "just and proper" section: 1) your legal conclusion, with factual support, showing that the respondent's ULPs will give rise to backpay; reference should be made to an affidavit of a Regional official who has estimated net backpay; 2) a statement that respondent has ceased operations and/or is in the process of liquidation or has threatened to do so; and 3) (if appropriate) a factual recitation showing that respondent was unwilling to informally set aside funds to cover its backpay liability.[1] The "just and proper" section should also contain the following analysis:[2]

1. NLRB Backpay Orders - The Statutory Scheme

In Section 10(a) of the Act [29 U.S.C. Section 160(a)], Congress granted to the Board exclusive authority, acting in the public interest, to prevent any person from engaging in unfair labor practices. See *Amalgamated Utility Workers v. Consolidated Edison Co. of N.Y.,* 309 U.S. 261, 265 (1940). In addition, Section 10(c) of the Act [29 U.S.C. Section 160(c)] empowers the Board to remedy those violations already committed by "restor[ing], as far as possible the status quo that would have obtained but for the wrongful act." *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 265 (1969). In *Rutter-Rex,* the Court explained that "[r]estoration of the status quo not only secures the rights of the injured parties, but also deters the commission of unfair labor practices by preventing the wrongdoer from gaining by his unlawful conduct." ~. Accordingly, Congress specifically included among the remedies made available to the Board "the affirmative action" of awarding backpay to employees. NLRA Section 10(c). Thus, like the Board's other remedies restoring the status quo ante, a backpay order "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the public policy which the Board enforces*." Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419 (1975), quoting from *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941).[3]

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[1] Where the Region's evidence of a respondent's intent to either liquidate its assets or to evade its Board backpay obligation is based solely on the testimony of Board agents, permission to testify must be sought under the Board's Rules and Regulations, Sec. 102.118 through the Division of Operations Management. Further, consideration should be given to designating new counsel for the Region in litigating the case where the investigating agent will become a critical witness.

[2] Section 3 infra should be modified to reflect the facts of the case.

[3] See, also *Nathanson v. NLRB,* 344 U.S. 25, 27 (1952); *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 900 (1984).

APPENDIX I

In recognition of the importance of a backpay award as a remedial device, the federal courts have acted to preserve the vitality of such a Board backpay order in situations where its efficacy was being threatened by external forces. For example, in *NLRB v. Killoren,* 122 F.2d 609 (8th Cir. 1941), reh. denied, cert. denied 314 U.S. 696, the court held that the Board was entitled to make a proof of claim under the Bankruptcy Act despite the absence of any -finalized amount of backpay liability. The court cogently explained the need to preserve the Board's authority to effectively award backpay (122 F.2d at 612):

> An unvindicated or paper decree [awarding backpay] would hardly tend to encourage self—organization efforts and peaceful industrial relations. And so, public policy cannot permit such a valid order of the Board to be thwarted or escaped, if there is any sound way to prevent it. The mere fact that an employer may cease to do business certainly does not end the public interest involved in seeing that a back pay award under the Act is satisfied.

Likewise, in *NLRB v. Sunshine Mining Company,* 125 F.2d 757 (9th Cir. 1942), the court enjoined a state garnishment proceeding against a respondent employer because it would have interfered with the Board's backpay processes.[4]

Of course, it is also possible for a respondent deliberately to defeat a backpay order of the Board by dissipating or dispersing its assets before the Board either can finally compute the amount of backpay liability or can obtain enforcement of its remedial order under Section 10(e) of the Act [29 U.S.C. Section 160(e)].[5] In either case, if the respondent were permitted to accomplish this goal, the Board's backpay order would become simply a "paper decree" -- a nullity in fact. Where courts have been confronted with such a threat, they have not hesitated to issue appropriate orders to preserve the vitality of the Board's backpay award.

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[4] Accord: *NLRB v. Schertzer,* 360 F.2d 152 (2d Cir. 1966); *Lenz v. Lenz,* 723 F. Supp. 1329 (N.D. Iowa 1989), affd. 915 F.2d 388 (8th Cir. 1990). See also *NLRB v. Stackpole Carbon Co.,* 128 F.2d 188 (3d Cir. 1942) (state agency as creditor of discriminatees may not attach backpay fund established by employer); *NLRB v. Mooney Aircraft, Inc.,* 366 F.2d 809 (5th Cir. 1966) (employer may not use debts of employees as set off to Board backpay).

[5] It is well settled that a respondent's sale or liquidation of its business does not extinguish its backpay liability for unfair labor practices committed prior to such termination of operations. See *Golden State Bottling Co., Inc. v. NLRB,* 414 U.S. 168, 187 n. 9 (1973); *Waterman Steamship Corporation v. NLRB,* 119 F.2d 760, 763 (5th Cir. 1941).

Thus, in *NLRB v. Kellburn Manufacturing Co., Inc.,* 149 F.2d 686 (2d Cir. 1945), the court ordered a respondent in the process of liquidation to preserve its assets pending the Board's final computation of the respondent's backpay obligation. Similarly, where courts of appeals have been presented with evidence that an employer is divesting itself of its assets while a backpay order against it is pending enforcement under Section 10(e) of the Act, the courts have granted to the Board temporary injunctions preserving the respondent's assets pending completion of the Board's enforcement proceedings.[6]

In their concurring opinion in *NLRB v. Deena Artware, Inc.,* 361 U.S. 398, 412 (1960), Justices Harlan and Frankfurter observed that:

> [i]t is plainly within that [permissible] area of discretion for the Board to order an employer who is found to have violated Section 8 by the discriminatory discharge of employees, to refrain from conduct which is solely designed to defeat any remedial backpay order which may be entered when specific amounts are finally determined.

The Justices obviously were endorsing court enforcement of such an order to enjoin a respondent from dissipating its assets while the amount of backpay owing is being decided in a supplemental backpay hearing.[7] Moreover, it is well settled that federal courts have general equity power to preserve funds that are the subject of disputes before administrative agencies.[8]

2. Section 10(j) and Temporary Sequestration of Assets Injunctions

The same considerations are equally compelling where a respondent in an unfair labor practice proceeding before the Board threatens to render any remedial backpay order meaningless by undertaking to dissolve its business and/or dispose of its assets while the Board is adjudicating the charges against it. In enacting Section 10(j) of the Act, Congress provided an appropriate avenue by which the Board may obtain temporary injunctive relief in just such circumstances to protect its ability to issue an effective administrative remedial order.

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[6] See, e.g., *NLRB v. Interstate Equipment Co.,* 74 LRRM 2003 (7th Cir. 1970); *NLRB v. Burnette Castings Co.,* 24 LRRM 2354 (6th Cir. 1949). See also *NLRB v. A.N. Electric Corp.,* 140 LRRM 2860 (2d Cir. 1992); *NLRB v. Irving N. Rothkin,* 95 LRRM 3108 (6th Cir. 1977) (on contempt).

[7] See generally *Nathanson v. NLRB,* 344 U.S. at 28-29; *NLRB v. Trident Seafoods Corp.,* 642 F.2d 1148, 1150 (9th Cir. 1981).

[8] See *U.S. v. First National City Bank,* 379 U.S. 378 (1965); *Deckert v. Independence Shares Corp.,* 311 U.S. 282 (1940); *U.S. v. Morgan,* 307 U.S. 183 (1939).

Thus, in considering its 1947 amendments to the original Wagner Act, Congress observed that "[e]xperience under the . . . Act has demonstrated that by reason of lengthy hearing and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done," and that "it has sometimes been possible for persons violating the Act to . . . make it impossible or not feasible to restore or preserve the status quo pending litigation.'[t] S. Rep. No. 105, BOth Cong., 1st Sess., p. 27, reprinted in I *Legislative History of the Labor Management* Relations Act of 1947), 433 (G.P.O. 1985). It was in response to this shortcoming, and to protect the public interest in the effectuation of the remedial purposes of the Act, that Congress enacted Section 10(j), empowering the Board to seek temporary injunctive relief in the appropriate district court to preserve the status quo pending determination of the issues by the Board.[9]

As noted by the Second Circuit, "'the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in [Section 10(j)] cases'" *Seeler v. The Trading Port, Inc., 517 F.2d at 40,* quoting from *Hecht Co. v. Bowles,* 321 U.S. 321, 331 (1944). While a district court under Section 10(j) is given broad discretion to protect the public interest, its ruling is subject to meaningful review to ensure consistency with the statutory purpose of the Act. *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 749.[10]

It is fully consonant with these principles that, in appropriate cases, the Board has sought, and the district courts have granted, interim orders under Section 10(j) of the Act to preserve, pending the Board's adjudication of unfair labor practice charges, a portion of a respondent's assets sufficient to ensure the respondent's ability to satisfy its potential backpay liability. See *Hirsch v. Dorsey Trailers, Inc.,* 147 F.3d 243 (3d Cir. 1997); *Schaub v. Brewery Products, Inc.,* 715 F. Supp. 829 (E.D. Mich. 1989); *Kobell v. Menard Fiberglass Products, Inc. et al.,* 678 F. Supp. 1155 (W.D. Pa. 1988); *Pascarell v. Alpine*

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[9] See *Asseo v. Pan American Grain Co.,* 805 F.2d 23, 25 and 26 (1st Cir. 1986); *Seeler v. The Trading Port, Inc.,* 517 F.2d 33, 37-38 (2d Cir. 1975); *Pascarell v. Vibra Screw, Inc.,* 904 F.2d 874, 878-879 (3d Cir. 1990); *NLRB v. Aerovox Corporation,* 389 F.2d 475, 477 (4th Cir. 1967); *Boire v. Teamsters,* 479 F.2d 778, 787-788 (5th Cir. 1973), rehearing denied 480 F.2d 924 (5th Cir. 1973); *Schaub v. West Michigan Plumbing & Heating, Inc.,* 250 F.3d 962 (6th Cir. 2001); *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1566 (7th Cir. 1996); *Minnesota Mining & Manufacturing Co. v. Meter,* 385 F.2d 265, 269-270 (8th Cir. 1967); *Scott v. Stephen Dunn & Associates,* 241 F.3d 652, 659 (9th Cir. 2001); *Sharp v. Webco Industries, Inc.,* 225 F.3d 1130, 1136 (10th Cir. 2000);); *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 371 (11th Cir. 1992); *UAW v. NLRB (Ex-Cell-O Corp.),* 449 F.2d 1046, 1050-1053 (D.C. Cir. 1971).

[10] Accord: *Fleischut v. Nixon Detroit Diesel, Inc.,* 859 F.2d 26, 30-31 (6th Cir. 1988). Section 10(j) injunctions are temporary in nature, and last only during the litigation of the administrative proceedings before the Board. The injunction terminates by operation of law upon the issuance of the Board's administrative decision and order. *Barbour v. Central Cartage, Inc.,* 583 F.2d 335 (7th Cir. 1978).

Fashions, Inc., 126 LRRM 2242 (D. N.J. 1987); *Norton v. New Hope Industries, Inc.*, 119 LRRM 3086 (M.D. La. 1985); *Maram v. Alle Arecibo Corp. et al.*, 110 LRRN 2495 (D. P.R. 1982) (sequestration of assets orders); *Fuchs v. Workroom For Designers, Inc.*, 116 LRRN 2324 (D. Mass. 1984) (appointment under Section 10(j) of special master with receivership powers).[11] For where, as here, Petitioner has shown reasonable cause to believe **[or: a likelihood of success in proving]** that a respondent has engaged in unfair labor practices which ultimately will give rise to a remedial backpay order, and where there is evidence that the respondent is liquidating and/or dispersing its assets or threatening to do so, without providing for satisfaction of that future backpay liability, the issuance of an order under Section 10(j) of the Act enjoining the dissipating of assets, or sequestering assets, or directing the deposit of funds with the registry of the district court, or establishing a receivership, is clearly "just and proper" -- indeed, is absolutely essential -- to preserve the status quo and prevent the nullification or frustration of the Board's ultimate remedial order. See generally *Angle v. Sacks*, 382 F.2d at 660.[12]

In sum, where a district court temporarily encumbers a respondent's funds at the Board's petition under Section 10(j), it acts "for the protection of the litigants and the public, whose interests the injunction and final disposition of the fund[s] affect." *U.S. v. Morgan*, 307 U.S. at 193-194. Accordingly, where, in the exercise of its informed discretion,[13] the Board seeks such a temporary order sequestering a portion of a respondent's assets, we submit that the request should be granted unless it can be shown that the order is a patent attempt to achieve ends not effectuating the purposes and policies of the Act. Cf. *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346-347 (l953).[14]

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[11] Significantly, the standards for issuing preliminary relief pursuant to Section 10(j) of the Act are the same as those for issuance of such relief under Section 10(e), *NLRB v. Aerovox Corp.*, 389 F.2d at 477, and as shown above, pp. 2-3 the courts of appeals have been receptive to requests for interim sequestration of assets orders under Section 10(e).

[12] Similar preliminary injunctive relief has often been granted to other federal agencies in like circumstances. See, e.g., *Aldred Investment Trust v. SEC*, 151 F.2d 254 (1st Cir. 1945), cert. denied 326 U.S. 795 (1946); *SEC v. American Board of Trade, Inc.*, 830 F.2d 431, 438-39 (2d Cir. 1987); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir. 1982), cert. denied 456 U.S. 973; *SEC v. Bartlett*, 422 F.2d 475 (8th Cir. 1970); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982); *CFTC v. Muller*, 570 F.2d 1296 (5th Cir. 1978); *SEC v. Keller Corp.*, 323 F.2d 397 (7th Cir. 1963); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431 (11th Cir. 1984). See *also Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc.*, 759 F.2d 1094 (3d Cir. 1985) (Section 301 L.M.R.A. suit to enjoin distribution of employer assets pending arbitration); *IBT Local 71 v. Akers Motor Lines*, 582 F.2d 1336 (4th Cir. 1978), cert. denied 440 U.S. 929 (same).

[13] See *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 960 (1st Cir. 1983).

[14] See generally *Mono v. North American Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980) (aggressive remedial relief on an interim basis under Section 10(j) is necessary in

3. A Temporary Sequestration of Assets Injunction Under Section 10(j) is Just and Proper In this Case

Petitioner believes that the evidence that will be adduced before the Court will satisfy the standards necessary to warrant issuance of a temporary sequestration of assets injunction under Section 10(j). The record will establish reasonable cause to believe **[or: a likelihood of success in proving]** that Respondent has committed unfair labor practices that will give rise to a remedial backpay obligation under the Act. The facts also will indicate that the conduct of Respondent creates a -reasonable possibility that, absent such interim relief, the Board's ultimate backpay award will be nullified or frustrated by a dissipation or dispersal of Respondent's assets. See *FSLIC v. Sahni,* 868 F.2d 1096, 1097 (9th Cir. 1989) (federal agency entitled to asset freeze under preliminary injunction where there existed "possibility of dissipation"; where public interest is involved court's equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake", quoting from *FTC v. H.N. Singer, Inc.,* 668 F.2d 1107, 1112 (9th Cir. 1982)). The carefully tailored 10(j) order that Petitioner proposes is designed to be as accommodating as possible to Respondent's property/business rights, while at the same time guarantee to the Board the legitimate protection to look to Respondent's assets to satisfy a potential monetary award.

The temporary relief sought herein would not be unduly burdensome to the Respondent. It would not prevent the Respondent from selling any of its assets in arms' length transactions for a fair and present consideration. Nor would it proscribe the Respondent from incurring and paying legitimate, current business expenses. Rather, it would merely preclude the Respondent from dispersing or dissipating its assets or the proceeds of the sale thereof without first ensuring the preservation of sufficient funds to satisfy its potential statutory backpay obligation. See *Kobell v. Menard Fiberglass,* 678 F. Supp. at 1166-1167; *Schaub v. Brewery Products,* 715 F. Supp. at 831. This temporary deprivation of Respondent's unfettered control over its property is consistent with due process standards. See generally *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 618-619 (1974); *Deckert v. Independence Shares Corp.,* 311 U.S. at 288-290. The requested injunction would, moreover, respect the prior claims of secured and judgment creditors. For, the Board seeks only the status of an unsecured creditor and its pro rata share of assets available after the discharge of secured obligations. Cf. *Nathanson v. NLRB,* 344 U.S. at 27. The amount of money that may be properly sequestered need only be a "satisfactorily close approximation" of a respondent's total backpay obligation. See *Schaub v. Brewery Products,* 715 F. Supp. at 831. As noted supra, any relief granted by

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appropriate labor cases). Accord: *Scott v. El Farra Enterprises, Inc.. d/b/a Bi-Fair Market,* 863 F.2d 670, 676-677 (9th Cir. 1988) (district court should give "great deference" to Board's choice of interim relief under Section 10(j)).

the Court is temporary in nature, and lasts only during the administrative litigation before the Board. *Barbour v. Central Cartage, Inc.,* 583 F.2d at 337.[15]

Further, in order to insure compliance with the injunction, it is also just and proper for the Court to require the Respondent to affirmatively carry out the following obligations: maintain regular business records and grant Board agents reasonable access to such records for inspection and copying, see *Kobell v. Menard Fiberglass Products,* 678 F. Supp. at 1170, *Pascarell v. Alpine Fashions, Inc.,* 126 LRRM at 2245, *FTC v. H.N. Singer, Inc.,* 668 F.2d at 1114, *NLRB v. S.E. Nichols of Ohio, Inc.,* 592 F.2d 326 (6th Cir. 1979), *Sandy Hill Iron and Brass Works,* 69 NLRB 353, 382 (1946), enfd. 165 F.2d 660, 663 (2d Cir. 1947); grant Board agents reasonable access to its plant and business premises in order to verify the accuracy of business records, see *NLRB v. Southwire Co.,* 801 F.2d 1252, 1259 (11th Cir. 1982); and file with the Court, with a copy submitted to Petitioner, within a reasonable period of time, a sworn statement (a) listing and describing all present assets valued in excess of $250, see *NLRB v. A.N. Electric Corp.,* 140 LRRN at 2862, *Norton v. New Hope Industries,* 119 LRRM at 3088; and (b) describing with specificity what steps it has taken to comply with the Court's injunction order, see *Pascarell v. Gitano Group, Inc.,* 730 F. Supp. 616, 625-626 (D. N.J. 1989), *Bloedorn v. Teamsters Local 695,* 132 LRRM 3102, 3110 (W.D. Wisc. 1989), *NLRB v. Southwire Co.,* 801 F.2d at 1259, *NLRB v. Ambrose Distributing Co.,* 382 F.2d 92, 96 (9th Cir. 1967). The injunction would also proscribe any destruction of business or financial records or documents. See, e.g., *CFTC v. Morgan Harris & Scott, Ltd.,* 484 F. Supp. 669, 671 (S.D.N.Y. 1979). In conclusion, we submit that the requested temporary injunctive relief as prayed for in the instant Petition is clearly "just and proper" within the meaning of Section 10(j) of the Act, as it will prevent a possible nullification or frustration of the policies and remedial purposes of the Act. See, e.g., *Hirsch v. Dorsey Trailers, Inc.,* 147 F.3d at 247; *Schaub v. Brewery Products,* 715 F. Supp. at 831; *Kobell v. Menard Fiberglass,* 678 F. Supp. at 1166-1167.[16]

[15] Indeed, upon the issuance of the Court's 10(j) decree, the Board would be required to expedite the underlying administrative proceeding consistent with its own outstanding Rules and Regulations. See 29 C.F.R. Section 102.94(a).

[16] Cf. *NLRB v. Kellburn Manufacturing Co., Inc.,* 149 F.2d at 687; *FTC v. Southwest Sunsites, Inc.,* 665 F.2d at 722; *FSLIC v. Sahni,* 868 F.2d at 1097.

APPENDIX I

APPENDIX I-10

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RONALD S. COHEN, Acting Regional Director
of the First Region of the
National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION UNDER SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, [29 U.S.C. SECTION 160(J)] [AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]][1]

I

STATEMENT OF THE CASE

This proceeding is before the Court on a petition filed by the Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), pursuant to Section 10(j) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 160(j)) (herein called the Act), for a temporary restraining order and a preliminary injunction pending the final disposition of the matters involved herein

[1] **[The All Writs Act applies only when the Region is authorized to enjoin a third party tha is not a party to the underlying unfair labor practice case.]**

pending before the Board on a Consolidated Complaint and Notice of Hearing issued by Petitioner on February 28, 2000, in NLRB Cases 1-CA-37811, 1-CA-37828, and 1-CA-37875, (herein called Consolidated Complaint), and a Complaint and Notice of Hearing issued by the Petitioner on March 7, 2000 in Case 1-CA-37931 (herein called Complaint), alleging that Estoril Cleaning Co., Inc., (herein called Respondent) violated Sections 8(a)(1) and (5) of the Act, by *inter alia*, failing to bargain in good faith with Service Employees International Union, Local 254, AFL-CIO, CLC, (herein called the Union) over the effects on its bargaining unit employees of its decision to cease its operations, and by failing to pay bargaining unit employees for work performed during the month of January 2000. Petitioner seeks a temporary restraining order and other injunctive relief in order to guarantee that, should the Board find Respondent has violated the Act, as alleged in the Consolidated Complaint and the Complaint, there will be money to satisfy the Board's remedial order. Petitioner seeks a temporary restraining order and other injunctive relief in order to prevent the Respondent from dispersing or dissipating assets, thereby frustrating any prospective remedial order of the Board.

It is recognized that District Courts have authority to grant temporary restraining orders under Section 10(j). *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 742-743 (7th Cir. 1976); *Kobell v. Menard Fiberglass Products, Inc.*, 678 F. Supp. 1155, 1157 (WD PA 1988).

This Court has the authority to grant a temporary restraining order pursuant to Section 10(j) of the Act **[**and/or the All Writs Act**]**, but may do so only after a respondent is given proper "notice." Adequate and appropriate notice pursuant to Section 10(j) of the Act is provided where, as here, Respondent **[**and counsel for Polaroid Corporation,

(herein called Polaroid)**]** were notified at about 2:00 p.m. and 1:45 p.m., respectively on March 7, 2000, that a petition for a temporary restraining order would be filed on March 8, 2000, and that a March 8, 2000 hearing would be requested. Moreover, Respondent **[**, Polaroid and Polaroid's counsel**]** will be served with copies of the pleadings herein on March 8, 2000. *Squillacote v. Local 248, Meat & Allied Food Workers*, supra, at 743.

II

LEGAL STANDARDS FOR INJUNCTIVE RELIEF

Section 10(j) of the Act was enacted by Congress as a means of protecting the Board's Orders from remedial failure during the pendency of its administrative proceedings. Absent interim relief under Section 10(j), those violating the Act (or seeking to evade their liability thereunder), might be able to accomplish their unlawful objective before being placed under any legal restraint. *Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1055 (2nd Cir. 1980) [citing S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947)].

This case meets the standards for obtaining a Section 10(j) injunction under such First Circuit cases as *Pye v. Sullivan Brothers Printers*, 38 F.3d 58, 147 LRRM 2584 (1st Cir. 1994); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990); *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25, 123 LRRM 2996, 3000 (1st Cir. 1986); *Fuchs v. Jet Spray*, 725 F.2d 664, 116 LRRM 2191 (1st Cir. 1983), aff'g. 560 F. Supp. 1147, 114 LRRM 3493 (D. Mass. 1983); and *Maram v. Universidad Interamericana*, 722 F.2d 953, 115 LRRM 2118 (1st Cir. 1983).

APPENDIX I

The First Circuit's standards for a temporary restraining order appear to be similar to those of a standard preliminary injunction, and the same factors are examined. *Merril Lynch, Pierce, Fenner & Smith, Inc., v. Bishop,* 839 F.Supp. 68 (D.ME.1993)

Under the First Circuit's standards, the district court may grant a Section 10(j) petition upon finding (1) that the Board has "reasonable cause" to believe the Act has been violated, and (2) that injunctive relief would be "just and proper," as expressly required by Section 10(j) itself. *Asseo v. Centro Medico del Turabo, Inc.*, supra at 454; *Asseo v. Pan American Grain Co.*, supra at 25; *Fuchs v. Hood Industries,* 590 F.2d 395, 397, 100 LRRM 2547, 2549 (1st Cir. 1979). In *Pye v. Sullivan Brothers,* the court indicated that if the reasonable cause test still survives, it is, in any event, subservient to the question, posed under the just and proper standard, of whether the Board has demonstrated a likelihood of success on the merits. 147 LRRM at 2588, n. 7. On the basis of the above analysis of the charges, the Petitioner believes that it has satisfied the First Circuit's "reasonable cause" standard establishing that violations of Section 8(a)(1) and (5) of the Act have occurred.

In determining whether injunctive relief is "just and proper," the First Circuit applies the standards it normally applies for preliminary injunctive relief. Specifically, these standards are: (1) that the plaintiff will suffer irrevocable injury if the injunction is not granted; (2) that such injury outweighs any harm which an injunction would inflict on the defendant if granted; (3) that the plaintiff has shown a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by granting the injunction. *Maram v. Universidad Interamericana,* supra, 115 LRRM at 2121, citing *Planned Parenthood League of Mass. v. Bellotti,* 641 F.2d 1006, 1009 (1st Cir. 1981).

In applying these "just and proper" standards, the First Circuit follows the "sliding scale" approach used by the Ninth Circuit in *Miller v. California Pacific Medical Center,* 19 F.3d 449, 145 LRRM 2769 (9th Cir. 1994) (en banc). Under this balancing test, as the degree of irreparable harm increases, the requirement for showing a probability of success on the merits decreases, and vice versa. Id. at 459-460. If the Board demonstrates that it is likely to prevail on the merits, irreparable harm may be presumed. If the charge is disputed, or if the Board has only a fair chance of succeeding on the merits, the court will expressly consider the possibility of irreparable harm. *Miller v. California Pacific,* 19 F.3d at 460. If the harm to the plaintiff outweighs the harm to the defendant, then a Section 10(j) injunction is just and proper. This is similar to the approach taken by the First Circuit in *Pye v. Sullivan Brothers,* a case dealing with allegations of withdrawal of recognition, the repudiation of collective-bargaining agreements, and a number of unilateral changes. In discussing its application of the just and proper test, the court stated: "When, as in this case, the interim relief sought by the Board 'is essentially the final relief sought, the likelihood of success should be *strong.*'" *Pan American Grain Co.,* 805 F.2d at 29 (emphasis added), 147 LRRM at 2588.

As to the applicability of these standards in a motion for a temporary restraining order (TRO), the purpose of a TRO is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. *CTC Communication, Inc., v. Bell Atlantic Corp.,* 14 F.Supp. 2d 133 (D. ME 1998)

District Courts have recognized the need for injunctive relief under Section 10(j) of the Act to prevent the dissipation of assets or other conduct by respondents that would

render a backpay order of the Board meaningless. *Schaub v. Brewery Products, Inc.,* 715 F. Supp. 829 (ED MI 1989); *Kobell v. Menard Fiberglass Products, Inc.,* 678 F. Supp. 1155 (WD PA 1988); and *Pascarell v. Alpine Fashion, Inc.,* 126 LRRM 2242 (D. N.J. 1987). [2] Here, Petitioner asks the Court to enjoin Respondent under Section 10(j) in order to preserve the ability of the Board to render a meaningful backpay order.

The Petitioner herein asks that the Court issue a temporary restraining order enjoining and restraining Respondent from distributing, transferring or disposing of its business assets or funds, except as permitted by the Court and by the terms of the temporary restraining order, and also enjoining and restraining Respondent from concealing, altering or destroying any of his business or personal financial documents. Petitioner asks that the temporary restraining order direct Respondent to deposit any income it presently has or should receive, immediately upon receipt, until the amount of $32,202.80 is reached, in the registry of the Court, in an interest bearing account, pending the Court's ruling on the merits of the petition for a temporary injunction. **[**Petitioner also asks that the temporary restraining order enjoin Respondent's former customer, Polaroid, from disbursing monies due to Respondent, pending the Court's ruling on the merits of the petition for a temporary injunction.**]** Finally, Petitioner respectfully asks the Court to direct Respondent to file an answer to the petition by 1:00 p.m. on March 14, 2000; to hold a hearing on the merits of Petitioner's request for a temporary restraining order on March 8, 2000, and to set a hearing on the merits of Petitioner's request for a temporary injunction for 10:00 a.m. on March 16, 2000, or as soon thereafter as counsel may be heard.

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[2] A copy of the LRRM report in *Pascarell v. Alpine Fashion, Inc.* is attached as Appendix A.

APPENDIX I

III

STATEMENT OF FACTS

Upon charges filed by the Union, in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, the Regional Director of Region One issued a Consolidated Complaint and Notice of Hearing on February 28, 2000, alleging that *inter alia*, by letter dated January 28, 2000, the Union requested that Respondent bargain collectively with it regarding the effects upon bargaining unit employees of Respondent's decision to close its operations effective January 31, 2000, and that Respondent failed and refused to bargain over the effects on unit employees of its decision to close its operations, which subject is related to wages, hours and other terms and conditions of employment and is a mandatory subject of bargaining.

Upon a charge filed by the Union, in Case 1-CA-37931, the Regional Director of Region One issued a Complaint and Notice of Hearing on March 7, 2000, alleging that Respondent failed to pay bargaining unit employees wages earned in January 2000, which subject relates to wages, hours and other terms and conditions of employment and is a mandatory subject of bargaining.

Respondent was in the business of providing cleaning services, and maintained only one cleaning contract, with Poloroid in Waltham, Massachusetts. Respondent employed approximately 46 employees when it closed its operations on January 31, 2000. Approximately 11 of these employees worked 40 hours per week on the day shift, and about 35 employees worked approximately 20 hours per week during the evenings.

The Union began organizing the Respondent's employees in about September 1998. An election was held on November 12, 1998, and the Union won this election by a

vote of 24 to 12. The Region certified the Union as the representative of the Respondent's employees who cleaned at Polaroid on November 24, 1998.

Sometime in January 2000, the Respondent decided not to re-bid its cleaning contract with Polaroid, which was set to expire on January 31, 2000. On January 24, 2000, another cleaning contractor, who is a signatory to the Master Janitorial Agreement, told the Union's business agent, Donald Coleman, (herein Coleman) that it would be taking over the Polaroid cleaning contract as of February 1, 2000 and hiring all of the unit employees. The Respondent never told the Union that it was not re-bidding its cleaning contract with Polaroid or that it was ceasing operations.

On January 28, 2000, Coleman sent a letter to Respondent's Owner, Emilia Delgado, (herein Emilia) and its Senior Vice-President of Operations, Marco Delgado, (herein Marco) requesting to meet with them to bargain over the effects of the Respondent's decision to cease its operations. The Respondent did not respond to Coleman's letter, and has since refused to meet and bargain with the Union over the effects of terminating its cleaning contract with Polaroid.

Since closing its operations on January 31, 2000, Respondent has failed and refused to pay its part-time employees for hours worked between January 17 and January 31, 2000. Additionally, the Respondent has failed to make good on a bounced check that it issued to one of its part-time employees for 40 hours worked during the first half of January 2000. [3]

[3] The Petitioner is seeking a protective order to sequester certain assets of the Respondent so that, in the event that the Region prevails on its Complaints, there will be sufficient funds to satisfy both a remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), which provides for a minimum of two-weeks of backpay for all unit employees where an employer has failed and refused to bargain over the effects of its closing of operation, and to compensate employees for the wages that the Employer

APPENDIX I

Before the Respondent failed and refused to bargain with the Union over closing its operations, Respondent violated the Act by refusing to sign an agreed upon collective-bargaining agreement and failing to provide relevant information to the Union.

On September 29, 1999, the Respondent and the Union signed an agreement, effective January 1, 2000, whereby the Respondent agreed to be bound by all terms and conditions of the Master Janitorial Contract, which had been negotiated between the Union and the Maintenance Contractors of New England, Inc. On November 14, 1999, the employees of the unit voted unanimously to ratify this agreement. On November 14, 1999, after the contract ratification vote, Coleman met with Marco and Emilia Delgado. At this time, Coleman notified the Delgados of the results of the ratification vote and told them that the written collective-bargaining agreement ("contract") between the Union and the Respondent would take effect January 1, 2000. Coleman told the Delgados that they had to execute the contract.[4]

Beginning on November 15, 1999, Coleman began calling Marco to set up a meeting where he and the Delgados would execute the contract. Coleman called Marco at least 20 times and left messages for Marco to call him back to set up a meeting.

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failed to pay to them for work performed during January 2000. The Petitioner is not otherwise seeking 10(j) injunctive relief. The portion of this memorandum relating to the Respondent's refusal to execute an agreed-upon collective-bargaining agreement and refusal to furnish information are included for background purposes and to demonstrate the Respondent's total disregard for compliance with the Act, thereby buttressing the need for a protective order.

[4] At some point, Coleman told the Delgados that the pay rates outlined in the contract need not be implemented until February 1, 2000, as the Master Agreement provides for a 30-day grace period.

Marco, however, failed to take or return any of Coleman's calls.[5] By letter dated December 6, 1999, Coleman informed Marco that he would be at the Respondent's office at 5:30 p.m. on December 8, 1999 to execute the contract. Coleman went to the Respondent's office for the purpose of executing the contract on December 7, 1999, December 8, 1999, and December 23, 1999. Marco was not at the office on any of these occasions.

On January 6, 2000, Coleman filed the charge in Case 1-CA-37811, alleging that the Employer had failed to execute the agreed-upon contract. Since that time, Marco has told Coleman that he had sent the signed contract, via certified mail, on numerous occasions.

On January 7, 2000, Coleman sent a letter to the Employer requesting that the Employer furnish the Union with the names, dates of hire, addresses, and work schedules of all Unit employees.

On January 24, 2000, Coleman spoke with Marco. Again, Marco told Coleman that Marco would send the signed contract to the Union that day.

On January 28, 2000, Coleman again spoke with Marco. Marco told Coleman that he would not send the signed contract to the Union because the Respondent was his mother, Emilia's, business and Marco did not want to get involved in the business any longer. That same day, Coleman sent a letter to Marco confirming this telephone conversation. After speaking with Marco, Coleman called Emilia Delgado. Emilia told Coleman that she would send the signed contract and forward a current seniority list to the Union if Coleman sent her a letter stating that this would resolve everything between

[5] Marco operated his business primarily by way of a cell phone with a caller identification feature.

the Employer and the Union. Coleman sent Emilia such a letter, dated January 28, 2000. Also in this January 28th letter, Coleman again requested that the Respondent provide the Union with the names, dates of hire, addresses, and work schedules of all unit employees, as well as the Respondent's complete payroll records for the preceding three months and a list of employees owed wages. To this date, the Respondent has sent none of the requested information to the Union.

Coleman spoke with Marco on numerous occasions when Marco has promised Coleman that the executed contract was "in the mail." Most recently, Coleman spoke to Marco on February 10, 2000, at which time Marco again told Coleman that he was sending the signed contract to Coleman that day. To this date, the Union has not received the signed contract from the Employer.[6]

The Respondent maintained an office at 1277 Main Street in Waltham until approximately August 1999. At that time, the Respondent's phone was disconnected and its place of business moved to 1273 Main Street. The Respondent did not notify the Union of its address change, nor did it provide the Union with a telephone number at which the Union could reach the Respondent. Throughout the time period of August of 1999 through January 2000, Marco claimed to have been overwhelmed by the vast disarray resulting from the Respondent's office move and has, therefore, been unable to locate certain documents, such as certified mail receipts, requested by the Board agent. The Employer closed its Waltham office upon ceasing its operations at Polaroid on January 31, 2000.

[6] The Union still needs the signed contract so that the Unit employees do not have to repeat the one-month grace period for contract benefits with their new employer.

Additionally, as part of its settlement of earlier charges filed against Respondent,[7] the Respondent was to pay $1035 to one discriminatee. This settlement agreement was approved on October 8, 1999. On October 12 and again on November 12, 1999, the Region sent letters to the Respondent requesting that it comply with the terms of the settlement. The Region's compliance officer phoned and left messages for the Respondent, who failed to respond to the compliance officer's messages. Finally, on December 16, 1999, the Region received a check in the amount of $1035 from Marco. While this check was signed by Marco, it was not drawn from a bank account of the Respondent, but rather from a bank account of a different corporation: Delgado Enterprises, Inc. Emilia is the principal officer of Delgado Enterprises, Inc.

The Respondent has submitted its final invoices to Polaroid, and Polaroid was processing those invoices when contacted by the Petitioner on February 17, 2000. Since that time, Polaroid has agreed to temporarily hold off on paying the money that it owes to the Respondent, but is awaiting a Protective Order that would secure this position.[8]

IV

REASONABLE CAUSE

It is well settled that, in Section 10(j) proceedings, the District Court is not called upon to decide the issues before the Board. *Rivera-Vega v. Conagra, Inc.*, 70 F.3d 153 (1st Cir. 1995); *Pye v. Sullivan Brothers Printers*, 38 F.3d 58, 147 LRRM 2584 (1st Cir.

[7] Cases 1-CA-36775 and 1-CA-37492.

[8] Polaroid currently owes the Respondent, and is temporarily holding, $54,331.52. Polaroid has informed the Petitioner that the monies are due to be paid to the Respondent on March 10, 2000, and it intends to tender the monies at that time unless enjoined from doing so. The Petitioner's initial calculations indicate that 2-weeks backpay for the unit would total approximately $15,700. Additionally, the unpaid wages alleged to be owing to employees in the recently filed charge would total approximately $10,300.

1994); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990); *Asseo v. Pan American Grain Co.,* 805 F.2d 23, 25, 123 LRRM 2996, 3000 (1st Cir. 1986)

Thus, the "reasonable cause" standard does not require the Board to adduce evidence to the extent required in a full hearing on the merits, nor does it require the District Court to resolve disputed issues of fact or credibility; rather, its role is limited to determining whether the NLRB's position is "fairly supported by the evidence." *Rivera-Vega v. Conagra, Inc.*, 70 F.3d 153 (1st Cir. 1995); *Pye v. Sullivan Brothers Printers*, 38 F.3d 58, 147 LRRM 2584 (1st Cir. 1994); quoting *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990).

The evidence which could be adduced in a hearing before this court shows that there is reasonable cause to believe that Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain over the effects of its closing of operations and by failing to pay employees wages due for work performed in January 2000, which would be remedied by requiring Respondent to, *inter alia*, compensate employees for the hours that they worked in January 2000, and pay a backpay remedy of a minimum of 2 weeks backpay per unit employee. *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *NLRB v. National Care Rental System, Inc.*, 672 F.2d 1182, 1191, 109 LRRM 2832 (3d Cir. 1982). In *Transmarine Navigation Corp.*, an employer unlawfully refused to bargain with a union about the effects on employees of the employer's closing of its operations. The Board held that the union was denied any opportunity to engage in meaningful bargaining, at a meaningful time: before the shut down, when the employer still may have needed the employees' services. The Board ordered a limited backpay remedy, which at

a minimum would equal two weeks, in part to make the employees whole, but also to recreate in some practicable manner a situation in which the parties' bargaining position has economic consequences for the employer. *Id.* This backpay award is not offset by the fact that the unit employees were hired by the new cleaning contractor and suffered no interruption in their work. See, *NLRB v. Dallas Times Herald*, 315 NLRB 700 (1994) [*Transmarine* remedy not offset by payments made pursuant to the Workers Adjustment and Retraining Notification Act of 1988 (WARN)].

V

A TEMPORARY RESTRAINING ORDER
IS JUST AND PROPER

The Board's remedies are restorative, rather than punitive. Backpay, specifically provided for in Section 10(c) of the Act, is central to the Board's remedial efforts to restore the lawful status quo. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). It is, therefore, respectfully submitted that, in order to protect the Board's ability it issue a meaningful backpay Order, and indeed its ability to remedy the unfair labor practices of Respondent, the Court should find that it is "just and proper" that a temporary restraining order be granted.

Federal Courts have granted extraordinary injunctions to preserve the assets of a defendant or respondent, where those assets appeared to be in danger of dissipation during the pendency of federal administrative proceedings, including those of the Board. *NLRB v. Horizon Hotel Corp.*, 159 LRRM 2449 (1st Cir. 1998)[9]; *Aldred Investment Trust v. SEC*, 151 F.2d 254 (1st Cir. 1945), cert. Denied 326 U.S. 795 (1946); *Kobell v.*

[9] A copy of the LRRM report in *NLRB v. Horizon Hotel Corp.* is attached hereto as Appendix B.

Menard Fiberglass Products, Inc., 678 F. Supp. 1155 (WD PA 1988); *Schaub v. Brewery Products, Inc.,* 715 F. Supp 829 (ED MI 1989). See generally*: SEC v. American Board of Trade, Inc.,* 830 F.2d 431, 438-439 (2nd Cir. 1987); *SEC v. Bartlett,* 422 F.2d 475 (8th Cir. 1970); *FTC v. Southwest Sunsites, Inc.,* 665 F.2d 711 (5th Cir. 1982), cert. denied 456 U.S. 973; *FSLIC v. Sahni,* 868 F.2d 1096 (9th Cir. 1989); *CFTC v. Morgan, Harris and Scott, Ltd.,* 484 F. Supp. 669, 671 (SDNY 1979) [temporary restraining order granted, prohibiting destruction of records.] Federal Courts have also found that relief such as the protective order requiring Respondent to pay income derived from revenues into the registry of the District Court prayed for here, to be appropriate in other administrative proceedings including those involving the Board. See e.g., *U. S. v. Morgan,* 307 U.S. 183, 193-94 (1939) (upholding deposit in court of stockyard rate differences pending determination of rates by Secretary of Agriculture); *In re Villa Marina Yacht Harbor, Inc.,* 984 F.2d 546 (1st Cir. 1993), cert. denied 510 U.S. 818 (court has inherent power to order mortgagor to make payments into court account; until judgment, neither party can use the money); *NLRB v. A.N. Electric, et al,* 141 LRRM 2386 (2nd Cir. 1992) (circuit court granted Section 10(e) (29U.S.C. Section 160(e) injunction to sequester funds in escrow account or registry of the court)[10]; *City of New York v. Citisource, Inc.,* 679 F. Supp. 393 (S.D.N.Y. 1988) (attachment of bank accounts in RICO action because risk of concealment); *SEC v. Netelkos,* 638 F. Supp. 503 (S.D.N.Y. 1986) (court ordered assets of respondent liquidated and deposited into interest bearing account under control of the clerk of the court); *Bentz v. International Longshoremen's Association, Local 1410,* Civil Action 75-507-H (S.D. Ala. Southern

[10] A copy of the LRRM report in *NLRB v. A.N. Electric, et al* is attached hereto as Appendix C.

Division March 11, 1996) (unpublished) (in Section 10(l) proceeding, 29 U.S.C. Section 160(l), district court ordered disputed funds paid into registry of court pending completion of Board's administrative proceeding).

Here, Respondent discontinued its operations on January 31, 2000. The assets of Respondent are uncertain as Respondent has failed to furnish the Union with requested information**[**; however, according to Polaroid, Polaroid will pay monies due to Respondent in the amount of $54,331.52 on March 10, 2000**]**.[11]

The Respondent's actions with regards to the investigation of the charges at hand as well as prior charges indicates that there is a strong likelihood that Respondent will dissipate its assets as quickly as possible if not precluded from doing so. In addition to violating the Act by refusing to notify the Union of its decision to close and thereafter refusing to bargain over the effects of ceasing its operations, the Respondent has also unlawfully refused to execute an agreed upon collective-bargaining agreement and refused to furnish information to the Union. The Respondent's conduct in these, as well as prior cases, demonstrates a total disregard for its employees' rights under the Act. Not only has the Respondent abruptly ceased its operations without informing the Union, the Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the Region; refused to

[11] As noted above, there is reasonable cause to believe that Respondent engaged in statutory violations which would be remedied by requiring Respondent to, *inter alia*, pay a backpay remedy of a minimum of 2 weeks backpay per unit employee. See *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *NLRB v. National Care Rental System, Inc.*, 672 F.2d 1182, 1191, 109 LRRM 2832 (3d Cir. 1982). As noted in the affidavit of Compliance Officer Elizabeth Gemperline, the Petitioner estimates the minimum backpay liability, also including money due to Unit employees for unpaid wages earned in January 2000 and estimated interest, to be $32,202.80.

accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Employer's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account. Finally, the Employer has totally ceased operations and the only assets known to exist that may be available to satisfy a Board order are the monies currently being held by Polaroid. Based upon the above, the Region believes that it may fairly be anticipated that Respondent will in fact dissipate its remaining assets and thus unjustifiably deny employees any opportunity to recover backpay and remedies pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389, as well as the unpaid wages Unit employees earned in January 2000. In these circumstances, not protecting the Respondent's assets would likely cause irreparable harm as it is very likely that no assets of the Respondent will exist by the time that a decision is rendered in this case.

In this case, it is "just and proper" to secure a protective order to secure the Respondent's remaining assets. *NLRB v. Horizon Hotel Corp.*, 159 LRRM 2449 (1st Cir. 1998); *Aldred Investment Trust v. SEC,* 151 F.2d 254 (1st Cir. 1945), cert. denied 326 U.S. 795 (1946); *Jensen v. Chamtech Services Center,* 155 LRRM 2058, 2059-60 (C.D. CA 1997) (10(j) sequestration of assets injunction granted; court balanced potential threat of dissipation of assets on respondent's inchoate NLRA backpay obligation against injunction's restrictions on respondent's use of its own assets)[12]; *Kobell v. Menard Fiberglass Products, Inc.*, 678 F. Supp. 1155 (WD PA 1988*); Schaub v. Brewery Products, Inc.,* 715 F. Supp 829 (ED MI 1989); *Pascarell v. Alpine Fashions, Inc.,* 126

[12] A copy of the LRRM report in *Jensen v. Chamtech Services Center* is attached hereto as Appendix D.

LRRM 2242 (D. N.J. 1987); *Norton v. New Hope Industries, Inc.*, 119 LRRM 3086 (M.D. LA 1985)[13].

An order precluding Respondent from dissipating its assets would preserve the status quo and prevent a frustration of a Board order in the Union's favor. While the hearing before an administrative law judge has been scheduled for April 3, 2000, an immediate final Board decision cannot issue in time to preserve these assets. Finally, an order preserving the assets would not interfere with any ongoing business operation, since the Respondent no longer operates.

[In addition, Petitioner requests that this Court issue a Temporary Restraining Order directed to Polaroid, enjoining Polaroid from disbursing monies due to Respondent, pending a hearing on Petitioner's request for a temporary injunction. It is appropriate to name Polaroid as a party-in-interest in the 10(j) proceedings and there is ample law to assert jurisdiction over it in this case. Under the All Writs Act,[14] the district court has authority to protect its jurisdiction for the purpose of issuing an effective Section 10(j) injunction against the Respondent. See, e.g., *Whitney Bank v. New Orleans Bank*, 379 U.S. 411, 425-426 and n. 7 (1965) (lower court could properly issue All Writs Act decree against non-defendant public official to preserve its own jurisdiction); *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-608 (1966) (federal agencies may use All Writs Act proceedings in order to ensure effective judicial review). Thus, the district court has jurisdiction under the All Writs Act to enjoin Polaroid to make payment directly into the

[13] A copy of the LRRM report in *Norton v. New Hope Industries, Inc.* is attached hereto as Appendix E.

[14] 28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

court's registry for the purpose of safeguarding the efficacy of the 10(j) decree against the Respondent. Such a course of action is not unprecedented for the Board. See *Aguayo v. Chamtech Service Center*, 157 LRRM 2299, 2300 (C.D. Ca. 1997) (ex parte TRO protective order under Section 10(j) and All Writs Act included parties not yet named in underlying Board administrative proceeding).

VI

CONCLUSION

Based on the petition, the affidavits and exhibits attached thereto, and on the points and authorities cited herein, Petitioner respectfully asks the Court to issue a temporary restraining order as prayed for in the petition herein.

DATED: March 8, 2000
Boston, Massachusetts

Respectfully submitted,
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APPENDIX J

GUIDELINES FOR FILING MOTIONS FOR TEMPORARY RESTRAINING ORDERS UNDER SECTION 10(j)

1. Overview

Temporary Restraining Orders (TROs) are limited injunctive orders designed to maintain the status quo pending a district court's adjudication of the merits of a request for a preliminary injunction. They are appropriate when irreparable harm will occur before a court can hear and decide the motion for a preliminary injunction and may be granted without the full notice and hearing requirements that attach to a preliminary injunction proceeding.[1]

District courts can grant TROs under Section 10(j). Such TROs are controlled by Fed. R. Civ. P. 65(b). See *Squillacote v. Local 248 Meat & Allied Food Workers*, 534 F.2d 735, 743, 92 LRRM 2089 (7th Cir. 1976). Courts have granted TROs under Section 10(j) in a variety of circumstances, including union picketing violence (see *Squillacote v. Local 248*, supra, *Wilson v. UAW*, 97 LRRM 2013 (S.D. Iowa 1977)), unlawful hiring arrangements (*Douds v. Anheuser-Busch, Inc.*, 28 LRRM 2277 (D. N.J. 1951)), refusals to bargain in good faith (*Danielson v. ILA*, 70 LRRM 2487 (S.D.N.Y. 1969) and to prevent the imminent sale or dissipation of assets by a respondent (see, e.g., *Kobell v. Menard Fiberglass Products, Inc.*, 678 F. Supp. 1155, 1157, 127 LRRM 2697 (W.D. Pa. 1988)). Courts have also granted TROs to prevent plant closings or relocations in the context of labor disputes. See, e.g., *ILGWU v. Bali Co.*, 649 F. Supp. 1083, 123 LRRM 3210 (D. P.R. 1986).[2]

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[1] There is normally no right to appeal either the grant or a denial of a TRO, as such decrees are not considered final orders under 28 U.S.C. Section 1292. See, e.g., *Austin v. Altman*, 332 F.2d 273 (2d Cir. 1964). But compare *Wirtz v. Powell Knitting Mills Co.*, 360 F.2d 730 (2d Cir. 1966) (denial of TRO may be appealed under 28 U.S.C. Section 1291 if passage of time may moot underlying dispute).

[2] TROs are also available under Section 10(l). However, they are not governed by Rule 65(b). Rather, Section 10(l) specifically allows for ex parte TROs when "substantial and irreparable injury to the charging party will be unavoidable" and establishes that TROs under this section may be effective for no more than five days. See *Squillacote v. Graphic Arts Int'l Union Local 277*, 540 F.2d 853, 859-860, 93 LRRM 2257 (7th Cir. 1976). Regions should follow the same general guidelines discussed in Section 3 infra when filing for TROs under Section 10(l). See also GC Memorandum 75-18, dated April 22, 1975, "Authorization of Regional Directors to Process Without Clearance Requests and Applications for Temporary Restraining Orders in Section 10(l) Proceedings –- Guide for Processing."

2. Duration of TROs

As established by Rule 65(b), TROs are limited to a duration of 10 days and may be extended for an additional 10 days for good cause shown. See, e.g., *U.S. v. United Mine Workers of America*, 330 U.S. 258, 301, 19 LRRM 2346 (1947) (good cause for extension found when arguments over contempt of TRO were still in progress at expiration of TRO). It will be appropriate to request an extension of the TRO in certain circumstances, such as when the injunction hearing cannot be scheduled before the TRO's original 10-day term. TROs may also be extended for longer periods of time when the restrained party consents to the extension. See, e.g., *Kobell v. Menard Fiberglass Products*, 678 F. Supp. at 1157.

A TRO's term under the "10 days plus 10 days" rule is computed on the basis of working days, excluding weekends and holidays. See *U.S. v. Int'l Brotherhood of Teamsters,* 728 F. Supp. 1032, 1057-1058, 134 LRRM 2281 (S.D.N.Y. 1990).

3. Notice and Service Requirements; Procedural Guidelines

Rule 65(b) provides that TROs may be issued in certain circumstances without any notice to the adverse party or hearing. There is some case law to suggest, however, that a TRO under Section 10(j), without any notice, is precluded by the jurisdictional language of that provision. Thus, the last sentence of Section 10(j) provides that "the court shall cause notice [of the 10(j) petition] to be served and *thereupon* shall have jurisdiction" to grant relief (emphasis added). One reading of this sentence is that the court obtains subject matter jurisdiction under Section 10(j) only after respondent is served with the 10(j) papers pursuant to a court-executed order to show cause. Consistent with this reading, at least one court has stated, in dicta, that ex parte (i.e. without *any* notice) TROs are not authorized under Section 10(j). See *Squillacote v. Local 248,* 534 F.2d at 743. Rather, when seeking TROs under 10(j) "the Board should give a respondent the most prompt and effective notice that can practically be given." *Id.* To avoid any question, when filing requests for 10(j) TROs, Regions should follow the general principles of *Squillacote v. Local 248* and the following guidelines:

a) Regions should notify the court ahead of time of their intention to file a request for a TRO and inquire of the clerk's office if the court has any preferred procedures for handling such requests.

b) Separate TRO and 10(j) papers should be prepared. TRO papers should include a motion for a TRO under Rule 65(b), a short memorandum of points in support of the TRO, a proposed order to show cause and a proposed TRO. Every TRO request must set forth the need for immediate relief pending the preliminary injunction hearing. Therefore, the TRO memorandum must set forth the arguments and facts showing the need for immediate action and should be supported by either a specially prepared

"immediate and irreparable injury" affidavit or, where appropriate, the preliminary injunction "just and proper" affidavits.[3]

> **For general guidance on the content and form of TRO papers, see Appendix H of this Manual (Sample 10(j) Pleadings); and for TROs seeking protective orders, see Appendix I.**

c) Regions should give early informal notice to respondents by providing copies of the complete 10(j) and TRO papers once they are ready for filing. TRO papers may include an affidavit of service that describes how respondent was given such prior notice of the 10(j) and TRO filings. In that case, the proposed TRO Order to Show Cause should also include language by which the court acknowledges that the papers have been served in the manner described in the affidavit of service and approves of such service. This procedure may speed up the processing of the TRO request if the court accepts this as sufficient notice to comply with due process and jurisdictional requirements. Regions should be aware, however, that the court may not deem this informal notice sufficient and may require that respondent be re-served after execution of the order to show cause.

These procedures should be sufficient to ensure speedy processing of the TRO request and full compliance with the "prompt and effective notice" requirement of *Squillacote v. Local 248*.[4]

On a few exceptional occasions, courts *have* granted ex parte TROs under Section 10(j) or 10(e), notwithstanding the rationale of *Squillacote v. Local 248*. *See NLRB v. Horizons Hotel Corp.*, 159 LRRM 2449 (1st Cir. 1998) (10(e)); *Aguayo v. Chamtech Service Center*, 157 LRRM 2299 (C.D. Cal. 1997) (10(j)); *NLRB v. A.N. Electric Corp.*,

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[3] Rule 65(b) requires that where a TRO is sought without any notice, the specific facts demonstrating irreparable harm before the adverse party may be heard must be set out in an "affidavit or verified complaint." It is unclear whether this requirement applies to TRO requests where some notice is given to the other party. Compare 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2952 (affidavit or verified complaint not "technically" necessary if notice has been given) with *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 543-544 (1991) (stating that Rule 65(b) requires verification or affidavit without making distinction between TROs with notice and ex parte TROs).

[4] In rare situations the warrant for a TRO may arise only after the commencement of the 10(j) case. The TRO can be sought at any time during the litigation. See generally *Douds v. Wine, Liquor & Distillery Workers Union*, 75 F. Supp. 184, 186, 21 LRRM 2120 (S.D.N.Y. 1947).

140 LRRM 2860, 141 LRRM 2386 (2d Cir. 1992) (10(e)).[5] Therefore, if a Region has reason to believe that an ex parte TRO is necessary in a particular case,[6] it should discuss the matter with the Injunction Litigation Branch before seeking such relief.

[5] In these cases, the court's jurisdiction had already been invoked in prior injunction or enforcement proceedings over at least some of the respondents included in the ex parte TRO request. In these instances, jurisdiction over additional respondents not involved in the original injunction or enforcement proceeding was asserted under the All Writs Act, 28 U.S.C. Section 1651(a), in addition to Section 10(j) or 10(e). See generally *FTC v. Dean Foods Co.,* 384 U.S. 597, 603-608 (1966).

[6] E.g., the possibility that a respondent may dissipate its assets if it receives notice before an order is entered.

APPENDIX K

SAMPLE MOTIONS & MEMORANDA TO HEAR 10(j) CASE ON AFFIDAVITS OR ALJ TRANSCRIPT

APPENDIX K

APPENDIX K 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In the Matter of RONALD S. COHEN, Acting Regional Director of the First Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner v. ESTORIL CLEANING CO., INC., Respondent and POLAROID CORPORATION Party-in-Interest	Civil No.

MOTION FOR HEARING ON AFFIDAVITS

Now comes Sara R. Lewenberg, Counsel for the Petitioner, Ronald S. Cohen, Acting Regional Director of the First Region of the National Labor Relations Board, herein called the Board, and respectfully moves that the injunctive relief prayed for in the Petition filed in the above-captioned case be granted based solely on the pleadings, including the verified assertions of belief made therein, and witness affidavits on which such belief is based, and that said relief be granted without conducting an evidentiary hearing regarding said Petition. In support of this Motion, Petitioner argues as follows:

In ruling on whether to grant the preliminary injunctive relief sought by the Board pursuant to 29 U.S.C. at Section 160(j), the District Court's role is properly limited to determining whether there is reasonable cause to believe that a respondent has violated the National Labor Relations Act, herein called the Act, and whether temporary

injunctive relief is just and proper. *Pye v. Excel Case Ready,* 238 F.3d 69, 72 (1st Cir. 2001). In addition, petitions under Section 10(j) or 10(l) of the Act receive statutory priority in the United States district courts under 28 U.S.C. Section 1657(a).

In light of this statutory scheme, it is well settled that district courts in proceedings under Section l0(j) or l0(l)[1] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe that the respondent has violated the Act.[2] See, e.g., *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d 953, 958-59 (1st Cir. 1983) (Sec. 10(j)); *Kobell v. United Paperworkers Int'l. Union,* 965 F.2d 1401, 1406-1407 (6th Cir. 1992) (Sec. 10(j)); *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 371-372 (11th Cir. 1992) (Sec. 10(j)); *Gottfried v. Sheet Metal Workers, Local No. 80,* 876 F.2d 1245, 1248 (6th Cir. 1989) (Sec. 10(l)); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d 744, 748 (9th Cir. 1988) (Sec. 10(j)); *Kaynard v. Mego Corp.,* 633 F.2d 1026, 1032-33 (2d Cir. 1980) (Sec. 10(j)); *Squillacote v. Graphic Arts International Union,* 540 F.2d 853, 858 (7th Cir. 1976) (Sec. 10(l)); *Gottfried v. Samuel Frankel, et al.,* 818 F.2d 485, 493 (6th Cir. 1987) (Sec. 10(j)); *Lewis v. New Orleans Clerks & Checkers, I.L.A., Local No. 1497,* 724 F.2d 1109, 1114-15 (5th Cir. l984) (Sec. 10(l)); *Boire v. Pilot Freight Carriers, Inc.,* 515 F.2d 1185, 1191

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[1] Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., *Hirsch v. Building and Construction Trades Council,* 530 F.2d 298, 302 (3d Cir. 1976).

[2] The Petitioner's additional burden of showing that injunctive relief is "just and proper" includes a showing of a likelihood of success on the merits. *Maram v. Universidad Interamericana,* 722 F.2d at 959; *Asseo v. Pan American Grain Co.,* 805 F.2d at 25. The First Circuit has held, however, that a showing of reasonable cause satisfies the "likelihood of success on the merits" requirement. *Asseo v. Centro Medico del Turabo, Inc.,* 900 F.2d at 454-455. Thus, the Court's inquiry into the likelihood of success on the merits does not require litigation of the underlying unfair labor practice.

(5th Cir. 1975), cert. denied 426 U.S. 934 (1976) (Sec. 10(j)); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1083-84 (3d Cir. 1984) (Sec. l0(j)); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 544-45 and n. 3 (9th Cir. l969) (Sec. l0(l)); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 435 (6th Cir. 1979) (Sec. 10(j)).

Moreover, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. See *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959 (Sec. 10(j)); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d at 372-373; *Scott v. El Farra Enterprises, Inc., d/b/a Bi-Fair Market*, 863 F.2d 670, 676 (9th Cir. 1988) (Sec. 10(j)); *Solien v. United Steelworkers of America*, 593 F.2d 82, 86-87 (8th Cir. l979), cert. denied 444 U.S. 828 (Sec. 10(l)); *Kaynard v. Independent Routemen's Assn.*, 479 F.2d 1070, 1072 (2d Cir. 1973) (Sec. 10(l)).

The District Court is thus not called upon to resolve disputed issues of fact or the credibility of witnesses; this function is reserved exclusively for the Board in the underlying administrative proceeding. See, *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959 (Sec. 10(j)); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996) (Sec. 10(j)); *Kobell v. United Paperworkers Int'l. Union*, 965 F.2d at 1407 (Sec. 10(j)); *Fuchs v. Jet Spray Corporation*, 560 F. Supp. 1147, 1150-51 at n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. l983) (Sec. 10(j)); *Balicer v. I.L.A.*, 364 F. Supp. 205, 225-226 (D. N.J. 1973), affd. per curiam 491 F.2d 748 (3d Cir. 1973) (Sec. 10(l)); *Dawidoff v. Minneapolis Building & Construction Trades Council*, 550 F.2d 407, 411 (8th Cir. 1977) (Sec. 10(l)); *Local 450, International Union of Operating Engineers, AFL-CIO v. Elliott*, 256 F.2d 630, 638 (5th Cir. 1958) (Sec. 10(l)); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d at 546 (Sec. 10(l)).[3]

[3] See also, *Jaffee v. Henry Heide, Inc.*, 115 F. Supp. 52, 57 (S.D.N.Y. 1953); *Fusco v. Richard W. Kaase Baking Co.*, 205 F. Supp. 465, 476 (N.D. Ohio 1962); *Taylor v. Circo*

Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and should accept the reasonable inferences he draws therefrom if they are "within the range of rationality". *Seeler v. The Trading Port, Inc.,* 517 F.2d 33, 36-37 (2d Cir. 1975) (Sec. 10(j)); Accord: *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d at 958-959 (Sec. 10(j)); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d at 371-372 (Sec. 10(j)); *Kaynard v. Palby Lingerie, Inc.,* 625 F.2d 1047, 1051 (2d Cir. 1980) (Sec. 10(j)); *Kobell v. Suburban Lines, Inc.,* 73l F.2d at 1084 (Sec. 10(j)); *Squillacote v. Graphic Arts International Union,* 540 F.2d at 858-859 (Sec. 10(l)); *Hendrix v. Operating Engineers, Local 571,* 592 F.2d 437, 442 (8th Cir. 1979) (Sec. 10(l)); *Levine v. C & W Mining Co., Inc.,* 610 F.2d at 435 (Sec. 10(j)); *Humphrey v. International Longshoremen's Association,* 548 F.2d 494, 498 (4th Cir. 1977) (Sec. 10(l)).

Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof,"[4] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See, *Gottfried v. Samuel Frankel,* 818 F.2d at 493 and 494 (Sec. 10(j)); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546 (Sec. 10(l)). See also, *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751.

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" determinations in Section 10(j) and 10(l) cases upon evidence presented in the form of affidavits or record testimony in a hearing before an administrative law judge. See, *Sharp v. Webco Industries Inc.,* 225 F.3d 1130, 1134 (10th Cir. 2000) (affidavits); *Silverman v. JRL Food Corp.,* 196 F.3d 334 (2d Cir.

Resorts, Inc., 458 F. Supp. 152, 154 (D. Nev. 1978); *Hoffman v. Cross Sound Ferry Service, Inc.,* 109 LRRM 2884, 2887 (D. Conn. 1982) (all Sec. 10(j) cases).

[4] *Kobell v. Suburban Lines, Inc. ,* 731 F.2d at 1084; *Levine v. C & W Mining Co.,* 610 F.2d at 435; *Gottfried v. Samuel Frankel,* 818 F.2d at 493; *Aguayo v. Tomco Carburetor, Inc.,* 853 F.2d at 748.

1999) (ALJ transcript); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546 (affidavits); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751 (same); *Squillacote v. Graphic Arts International Union,* 540 F.2d at 860; *Kennedy v. Teamsters, Local 542,* 443 F.2d 627, 630 (9th Cir. 1971) (same); *Squillacote v. Automobile, Aerospace & Agricultural Implement Workers,* 383 F. Supp. 491, 493 (E.D. Wis. 1974) (same).

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, *Kennedy v. Sheet Metal Workers,* 289 F. Supp. 65, 87-91 (C.D. Cal. 1968),[5] and such procedures do not deny a fair hearing or due process to the Respondents. See, *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751; *Asseo v. Pan American Grain Co.,* 805 F.2d at 25-26; *Gottfried v. Samuel Frankel,* 818 F.2d at 493; *Squillacote v. Graphic Arts International Union,* 540 F.2d at 860; *Kennedy v. Teamsters, Local 542,* 443 F.2d at 630; *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546. Cf. *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 263-64, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage).

In sum, submission of this Section 10(j) matter on the affidavits submitted by the Board will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully

[5] There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546.

comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657(a) and the original intent of the 1947 Congress which enacted Section 10(j). See *Legislative History LMRA 1947*, 414, 433 (Government Printing Office 1985).

Dated at Boston, Massachusetts this 8th day of March, 2000.

Respectfully submitted,

_____

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10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222-1072

APPENDIX K

APPENDIX K-2

IN THE UNITED STATES DISTRICT,COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

B. ALLAN BENSON, REGIONAL
DIRECTOR OF REGION 27 OF THE
NATIONAL LABOR RELATIONS BOARD,
FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

MAINTENANCE UNLIMITED, INC.,

Respondent.

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO TRY COMPLAINT AND PETITION FOR TEMPORARY INJUNCTION ON THE BASIS OF THE RECORD DEVELOPED BEFORE THE ADMINISTRATIVE LAW JUDGE

To the Honorable, the Judges of the United States District Court for the State of Colorado:

The petitioner moves the court to try the issues in this matter on the basis of Administrative Law Judge Transcript and Exhibits and exhibits submitted by the Board and the Respondent rather than holding an evidentiary hearing. The Petitioner suggests that trying this case on the basis of the Administrative Law Judge Hearing Transcript and Exhibits can both expedite the proceeding and conserve the resources of the court and the parties.

APPENDIX K

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. This provision embodies Congress' recognition that because the Board's administrative proceedings often are protracted, absent interim relief, a respondent in many instances could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. The legislative history is cited in cited in *Sharp v. Webco Industries, Inc.,* 225 F.3d 1130, 1136 (10th Cir. 2000) and *Angle v. Sacks,* 382 F.2d 655, 659-660 (10th Cir. 1967). Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. Id. at 659.

To resolve a Section 10(j) petition, a district court in the Tenth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See *Sharp v. Webco Industries,* 225 F.3d at 1133, 1137; *Angle v. Sacks,* 382 F.2d at 658, 660.

In light of this statutory scheme, it is well settled that district courts in proceedings under Section 10(j) or 10(l)[1] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe that the respondent has violated the Act. See, e.g., *Kobell v. United Paperworkers Int'l. Union,* 965 F.2d 1401, 1406-1407 (6th Cir. 1992) (Sec. 10(j)); *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 371-372 (11th Cir. 1992) (Sec. 10(j)); *Gottfried v. Sheet Metal Workers, Local No. 80,* 876 F.2d 1245, 1248 (6th Cir. 1989) (Sec. 10(l)); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d 744, 748 (9th Cir. 1988) (Sec. 10(j)); *Kaynard v. Mego*

[1] Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB to seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., *Hirsch v. Building and Construction Trades Council,* 530 F.2d 298, 302 (3d Cir. 1976)

Corp., 633 F.2d 1026, 1032-33 (2d Cir. 1980) (Sec. 10(j)); *Squillacote v. Graphic Arts International Union,* 540 F.2d 853, 858 (7th Cir. 1976) (Sec. 10(l)*); Gottfried v. Samuel Frankel, et al.,* 818 F.2d 485, 493 (6th Cir. 1987) (Sec. 10(j)); *Lewis v. New Orleans Clerks & Checkers, I.L.A., Local No. 1497,* 724 F.2d 1109, 1114-15 (5th Cir. 1984) (Sec. 10(l)); *Boire v. Pilot Freight Carriers, Inc.,* 515 F. 2d 1185, 1191 (5th Cir. 1975), cert. denied 426 U.S. 934 (1976) (Sec. 10(j)); *Kobell v. Suburban Lines, Inc.,* 731 F.2d 1076, 1083-84 (3d Cir. 1984) (Sec. 10(j)); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541, 544-45 and n. 3 (9th Cir. 1969) (Sec. 10(l)); *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d 953, 958-959 (1st Cir. 1983) (Sec. 10(j)); *Levine v. C & W Mining Co., Inc.,* 610 F.2d 432, 435 (6th Cir. 1979) (Sec. 10(j)).

Moreover, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. See *Arlook v. S. Lichtenberg & Co.,* 952 F.2d at 372-373; *Scott v. El Farra Enterprises, Inc. d/b/a Bi-Fair Market,* 863 F.2d 670, 676 (9th Cir. 1988) (Sec. 10(j)); *Solien v. United Steelworkers of America,* 593 F.2d 82, 86-87 (8th Cir. 1979), cert. denied 444 U.S. 828 (Sec. 10(l)); *Kaynard v. Independent Routemen's Association,* 479 F.2d 1070, 1072 (2d Cir. 1973) (Sec. 10(l)); *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d at 958-959 (Sec. 10(j)).

The district court is thus not called upon to resolve disputed issues of fact or the credibility of witnesses; this function is reserved exclusively for the Board in the underlying administrative proceeding. See *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1570, 1571 (7th Cir. 1996) (Sec. 10(j)); *Balicer v. I.L.A.,* 364 F. Supp. 205, 225-226 (D.N.J. 1973), affd. per cumiam 491 F.2d 748 (3d Cir. 1973) (Sec. 10(l)); *Dawidoff v. Minneapolis Building & Construction Trades Council,* 550 F.2d 407, 411 (8th Cir. 1977) (Sec. 10(l)); *Local 450, International Union of Operationg Engineers, AFL-CIO v. Elliott,* 256 F.2d 630, 638 (5th Cir. 1958) (Sec. 10(l)); *San Francisco-Oakland*

Newspaper Guild v. Kennedy, 412 F.2d at 546 (Sec. 10(l)); *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959 (Sec. 10(j)); *Kobell v. United Paperworkers Int'l. Union*, 965 F.2d at 1407 (Sec. 10(j)); *Fuchs v. Jet Spray Corporation*, 560 F. Supp. 1147, 1150-51 at n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983) (Sec. 10(j)).[2]

Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and should accept the reasonable inferences he draws therefrom if they are "within the range of rationality". *Seeler v. The Trading Post, Inc.*, 517 F.2d 33, 36-37 (2d Cir. 1975) (Sec. 10(j)); *Sequillacote v. Graphic Arts International Union*, 540 F.2d at 858-859 (Sec. 10(l)). Accord: *Arlook v. S. Lichtenberg & Co.*, 952 F.2d at 371-372 (Sec. 10(j)); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2d Cir. 1980) (Sec. 10(j)); *Hendrix v. Operating Engineers, Local 571*, 592 F.2d 437, 442 (8th Cir. 1979) (Sec. 10(l)); *Levine v. C & W Mining Co., Inc.*, 610 F.2d at 435 (Sec. 10(j)); *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959 (Sec. 10(j)); *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084 (Sec. 10(j)); *Humphrey v. International Longshoremen's Association*, 548 F.2d 494, 498 (4th Cir. 1977) (Sec. 10(l)).

Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof",[3] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See *Gottfried v. Samuel Frankel*, 818 F.2d at 493 and 494 (Sec. 10(j)); *San Francisco-Oakland Newspaper Guild*

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[2] See also, *Jaffee v. Henry Heide, Inc.*, 115 F. Supp. 52, 57 (S.D.N.Y. 1953); *Fusco v. Richard W. Kaase Baking Co.*, 205 F. Supp. 465, 476 (N.D. Ohio 1962); *Taylor v. Circo Resorts, Inc.*, 458 F. Supp. 152, 154 (D. Nev. 1978); *Hoffman v. Cross Sound Ferry Service, Inc.*, 109 LRRM 2884, 2887 (D. Conn. 1982) (all Sec. 10(j) cases).

[3] *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084; *Levine v. C & W Mining Co.*, 610 F.2d at 435; *Gottfried v. Samuel Frankel*, 818 F.2d at 493; *Aguayo v. Tomco Carburetor, Inc.*, 853 F.2d at 748.

v. Kennedy, 412 F.2d at 546 (Sec. 10(l)). See also *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751.

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" determinations in Section 10(j) and 10(l) cases upon evidence presented in the form of affidavits. See *Sharp v. Webco Industries, Inc.,* 225 F.3d 1130, 1134 (10th Cir. 2000) (affidavits); *Silverman v. JRL Food Corp.,* 196 F.3d 334 (2d Cir. 1999) (ALJ transcript); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751; *Squillacote v. Graphic Arts International Union,* 540 F.2d at 860. Accord: *Gottfried v. Samuel Frankel,* 818 F.2d at 493 (combination of affidavits and ALJ transcript); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546 (affidavits); *Kennedy v. Teamsters, Local 542,* 443 F.2d 627, 630 (9th Cir. 1971) (same); *Squillacote v. Automobile, Aerospace & Agricultural Implement Workers,* 383 F. Supp. 491, 493 (E.D. Wis. 1974) (same).[4] *A fortiorari,* reasonable cause determinations can also properly be based upon the transcript of sworn testimony given before an NLRB administrative law judge, subject to cross examination, in the underlying administrative proceeding. See *Gottfired v. Samuel Frankel,* 8181 F.2d at 493; *Asseo v. Pan American Grain Co.,* 805 F.2d at 493; *Asseo v. Pan american Grain Co.,* 805 F.2d 23, 25-26 (1st Cir. l979) (the use of an ALJ transcript "could be of considerable assitance in expediting the work of the [district] court."); *Eisenberg v. Honeycomb Plastics Corp.,* 125 LRRM 3257, 3262 (D. N.J. l987).[5]

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[4] See generally *F.T.C. v. Rhodes Pharmacal Co.,* 191 F.2d 744 (7th Cir. 1951); *U.S. v. Wilson Williams, Inc.,* 277 F.2d 535 (2d Cir. 1960); *Johnston v. J.P. Stevens & Company, Inc.,* 341 F.2d 891 (4th Cir. 1965).

[5] In *Kaynard v. Palby Lingeir, Inc.,* 625 F.2d 1047, 1050-51 (2d Cir. l980), the Second Circuit affirmed a Section 10(j) injunction issued by a district court on the basis of the transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding.

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, *Kennedy v. Sheet Metal Workers,* 289 F. Supp. 65, 87-91 (C..D. Cal. 1968),[6] and such procedures do not deny a fair hearing or due process to the Respondent. See *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751; *Asseo v. Pan American Grain Co.,* 805 F.2d at 25-26; *Gottfried v. Samuel Frankel,* 818 F.2d at 493; *Squillacote v. Graphic Arts International Union,* 540 F.2d at 860; *Kennedy v. Teamsters, Local 542,* 443 F.2d at 630; *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546. Cf. *Brock v. Roadway Express, Inc.* 481 U.S. 252, 263-64, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage).

In sum, submission of this Section 10(j) matter on the affidavits and exhibits submitted by the Board and the Respondent will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties.

[6] There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546.

Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657 and the original intent of the 1947 Congress which enacted Section 10(j). See I *Legislative History LMRA 1947* 414, 433 (Government Printing Office 1985).

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APPENDIX K

APPENDIX K-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 98-B-1144

B. ALLAN BENSON,
REGIONAL DIRECTOR FOR REGION 27
OF THE NATIONAL LABOR RELATIONS BOARD,
FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

MAINTENANCE UNLIMITED, INC.,

Respondent.

BRIEF OF NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF MOTION LIMITING SECTION 10(J) HEARING ON THE ISSUE OF "REASONABLE CAUSE TO BELIEVE" TO THE ADMINISTRATIVE RECORD AND SUPPLEMENTING THE RECORD WITH EVIDENCE ON WHETHER INJUNCTIVE RELIEF IS "JUST AND PROPER"

I. INTRODUCTION

The statutory scheme underlying Section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(j)("The Act"),[1] clearly permits this Court to rule

[1] Section 10(j) of the National Labor Relations Act provides:

> The Board shall have power, upon issuance of a Complaint as provided in subsection (b) [of this section] charging that any person has engaged in unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such

on the Petition without holding an additional evidentiary hearing on the merits of the unfair labor practice allegations. The issues presented by the petition are (1) whether there is reasonable cause to believe that the Respondent violated the Act as alleged, and (2) whether injunctive relief is just and proper. All of the evidence relevant to the first issue has been [will soon be] presented to an administrative law judge. Accordingly, although the introduction of evidence concerning the propriety of injunctive relief may be appropriate, the Petitioner urges this Court to determine whether there is reasonable cause to believe that the Respondent violated the Act based solely on the record [that will be] created before the administrative law judge.

The Petitioner seeks a temporary injunction preventing the Respondent from continuing its alleged unfair labor practices while the administrative proceedings are taking place. The question of whether the Respondent in fact violated the Act, which is not before this Court, can be determined only through those administrative proceedings. Inasmuch as the administrative law judge, the Board, and any reviewing court of appeals will only consider the administrative record when deciding whether the Respondent violated the Act, this Court should only consider that same record when deciding the first issue before it, i.e., whether there is reasonable cause to believe that the Respondent violated the Act.

The second issue before this Court, however, may not have been addressed in the administrative record. Thus, evidence relevant to whether injunctive relief would be just and proper may not be relevant to the primary question in the administrative proceedings, i.e., whether the Respondent violated the Act. Consequently, such evidence may not

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> person, and thereupon shall have jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper.

have been introduced or admitted during the administrative hearing. Therefore, the parties should be permitted to present to the Court evidence relevant to that second issue in the form of documents, affidavits, or testimony.

II. ARGUMENT

A. The Administrative Record Fully Answers the Question of Whether Reasonable Cause Exists, and the Introduction of Additional Evidence on that Issue Would be Improper

This 10(j) proceeding is not a replacement for, or a continuation of the administrative hearing. Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions to enjoin ongoing unfair labor practices pending the Board's resolution of its administrative proceedings. This provision embodies Congress' recognition that, because the Board's administrative proceedings often are protracted, a respondent, absent interim relief, could accomplish its unlawful objective before being placed under any legal restraint. In those circumstances, a final Board order would be rendered ineffective. *Sharp v. Webco Industries*, 225 F.3d 1130, 1135 (10th Cir. 2000); *Angle v. Sacks*, 382 F.2d 655, 659-660 (10th Cir. 1967).

The only issues before a district court in the Tenth Circuit in this type of ancillary injunction proceeding are whether there is "reasonable cause to believe" that the Respondent has violated the Act, and whether the Petitioner's requested temporary injunctive relief is "just and proper" pending final Board adjudication of the administrative proceeding. *See Sharp*, 225 F.3d 1130, 1137; *Angle*, 382 F.2d at 660. Thus, it is not the district court's role, in a 10(j) proceeding, to resolve the merits of the underlying dispute, and there is no need to receive additional evidence on that issue.

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In determining whether there is reasonable cause to believe that the Act has been violated, a United States District Court in the Tenth Circuit need only decide whether the Regional Director has produced some evidence that his position is fairly supported by the evidence. *Sharp*, 225 F.3d at 1134, *quoting Asseo v. Centro Medico Del Turabo, Inc.*, 900 F.2d 445, 450 (1st Cir. 1990). Further, the Regional Director need only advance legal theories that are "valid, substantial and not frivolous" in order to "permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *Sharp*, 225 F.3d at 1134, *quoting Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992). Clearly, the record produced at the administrative hearing, where each party had an opportunity to present evidence and cross-examine witnesses is sufficient to permit this Court to make these determinations.

In fact, the Court has no jurisdiction to resolve the merits of the underlying dispute—that is, whether Respondent actually committed the alleged unfair labor practices. That function is reserved exclusively for the Board under Section 10(a) of the Act, 29 U.S.C. Section 160(a), subject to limited appellate review by the courts of appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Section 160(e) or (f). *See, e.g., Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 748-49 and n.3 (9th Cir. 1988); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1083 (3d Cir. 1984); *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 792 (5th Cir. 1973). Furthermore, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. *See Arlook*, 952 F.2d at 372-373; *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 958-959 (1st

Cir. 1983). Thus, because of the court's role, a Section 10(j) proceeding has a much more limited evidentiary scope than the Board's administrative hearing.

The Court's inquiry is limited to a determination as to whether the conflicting evidence, viewed in a light most favorable to the Petitioner, could ultimately be resolved by the Board in the Petitioner's favor. *See Arlook*, 952 F.2d at 371; *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987). It is unnecessary, indeed improper, for the district court to resolve disputed issues of fact or witness credibility; these functions are reserved exclusively for the Board in the underlying administrative proceeding. *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996); *Gottfried*, 818 F.2d at 493 (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict). Since the Court is not permitted to resolve conflicts in the evidence, a "complete" story is not necessary to make a reasonable cause determination. *See Gottfried*, 818 F.2d at 493 Reasonable cause determinations can thus properly be based upon the transcript of sworn testimony given before a Board ALJ, subject to cross examination, in the underlying administrative proceeding. *See Gottfried*, 818 F.2d at 493 (injunction based upon use of partially completed ALJ hearing transcript, supplemented by affidavits proper); *Fuchs v. Hood Industries, Inc.*, 590 F.2d 395, 398 (1st Cir. l979) (ALJ transcript "could be of considerable assistance in expediting the work of the [district] court."); *Eisenbergv. Honeycomb Plastics Corp.*, 125 LRRM 3257, 3262 (D.N.J. l987) (administrative record sufficient to determine reasonable cause; parties granted leave to supplement ALJ record with evidence relevant to "just and proper" issue).[2]

[2] In *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1050-51 (2d Cir. l980) the Second Circuit affirmed a Section 10(j) injunction issued by a district court on the basis of the

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The district court may not decide to issue or deny injunctive relief based on its belief as to whether Respondent committed the alleged unfair labor practice. *Kobell,* 731 F.2d at 1083. The district courts, therefore, should give the Regional Director's version of the disputed facts, which were introduced during the administrative hearing, the "benefit of the doubt," and should accept the reasonable inferences the Regional Director has drawn therefrom, provided they are "within the range of rationality." *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 36-37 (2d Cir. 1975); *Arlook,* 952 F.2d at 371-372.

Once the record before the administrative law judge has been closed, the Board will not, indeed cannot, consider any other evidence in making a determination on the merits of the unfair labor practice allegations. Administrative Procedure Act, 5 U.S.C. Section 556(e) (1998). *See also NLRB v. Johnson*, 310 F.2d 550, 552 (6th Cir. 1962) (per curiam); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977); *Marmon v. Califano,* 459 F. Supp. 369, 371 (D. Mont. 1978); *Innovative Communications Corp.*, 333 NLRB 665, 665 n.2 (2001) (Board refused to consider documents entered in related 10(j) proceeding but not made part of administrative record). Therefore, any new testimony or other evidence regarding the merits created after the close of the administrative hearing is irrelevant to the merits of the unfair labor practice allegations and cannot be considered by the Board in the ultimate resolution of the underlying administrative case. Thus, the admission of additional "reasonable cause" evidence by the Court in this Section 10(j) proceeding could not assist the Court in determining whether the Board could reasonably

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transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding. In *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25-26 (1st Cir. l986) the First Circuit affirmed a Section 10(j) injunction based upon a partially completed ALJ hearing transcript, supplemented by live testimony before the district court.

sustain the allegations of the General Counsel's unfair labor practice complaint. *See Arlook*, 952 F.2d at 372-73. In fact, this Court's reliance on "new" evidence could hinder its ability to make this determination, as such evidence will not be considered by the Board in the unfair labor practice proceeding. In sum, there is no reason to permit the Respondent to re-litigate the unfair labor practice case before this Court.[3]

Contrary to the Respondent's assertion, this Court's failure to hold an evidentiary hearing would not deny a fair hearing or due process to the Respondent. *See Gottfried*, 818 F.2d at 493; *Asseo*, 805 F.2d at 25-26; *Aguayo v. Graphic Arts International Union*, 540 F.2d 853, 860 (7th Cir. 1976). Cf. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263-64, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage). The Respondent fully participated [will fully participate] in the evidentiary hearing before the Board's ALJ and had [will have] every opportunity to present its case. The Respondent also had [will have] the opportunity to cross-examine all of the General Counsel's witnesses and to present its own witnesses. In addition, pursuant to Board Rule 102.118(b)(1), 29 C.F.R. Section 102.118(b)(1)(1998),[4] the Board's "*Jencks* rule,"[5] the

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[3] The district court's findings in the Section 10(j) proceeding are unrelated to the administrative proceeding except to the extent that the administrative record supports the granting or denial of interlocutory relief. *NLRB v. Acker Industries, Inc.*, 460 F.2d 649, 652 (10th Cir. 1972) (result in 10(j) litigation not binding upon Board in underlying administrative proceeding).

[4] The relevant portion of the Rule reads as follows:

> [A]fter a witness called by the General Counsel … has testified … the administrative law judge shall, upon motion of the respondent, order the production of any statement of such witness in the possession of the General Counsel which relates to the subject matter as to which the

Respondent had [will have] an opportunity to examine the pre-trial affidavits of all the General Counsel's witnesses before commencing its cross-examination. Moreover, neither Rule 43 nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this statutory temporary injunction proceeding. *See Kennedy v. Sheet Metal Workers*, 289 F. Supp. 65, 87-91 (C.D. Cal. 1968).[6] Likewise, there is nothing in the text of Section 10(j) that mandates oral testimony in this proceeding. Accordingly, the Respondent cannot claim reasonably to have been denied due process, nor should it use such an argument to support any attempt to introduce new evidence regarding any "reasonable cause" issues before the Court.

For all of the foregoing reasons, the Court should grant the Petitioner's Motion to decide the reasonable cause issue in this case based solely on the record created during the administrative proceedings.

> witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

[5] Patterned after the Supreme Court's decision in *Jencks v U.S.*, 353 U.S. 657, 77 S.Ct. 1007 (1957). *See also Harvey Aluminum v. NLRB*, 335 F.2d 749 (9th Cir. 1964); *Inland Shoe*, 211 NLRB 724, 724 n.3 (1974).

[6] In its Objection and Response to Petitioner's Motion to Try Complaint and Petition for Temporary Injunction on the ALJ Record, the Respondent points out that under Fed.R.Civ.P. 65(a)(2) the Court may order the trial on the merits consolidated with hearing of the application for injunction and that Fed.R.Civ.P. 43(a) requires that, in every trial, testimony of witnesses shall be taken in open court. However, in the instant case, the trial on the merits was already held before the ALJ. No trial will be held in District Court on the merits. Rather, the Court is *only* called upon to decide whether an injunction should issue. Consequently, Rule 43(a) simply does not apply in this case.

B. The Parties Should be Permitted to Introduce Evidence as to Whether Injunctive Relief Would be Just and Proper

While the administrative record is sufficient to resolve the "reasonable cause" issue, the Court should allow the parties to present supplemental evidence and make appropriate arguments as to whether injunctive relief is "just and proper." Injunctive relief is just and proper when there is a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless in the absence of interim relief. *Angle v. Sacks*, , 382 F.2d 655, 660 (10th Cir. 1967). The burden is on the Regional Director to show that there is a reasonable apprehension that the purposes of the Act will be defeated absent interim relief, s*ee id.*, but the Court is afforded a certain range of equitable discretion in making the "just and proper" determination. *See Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189 (5th Cir. 1975), *cert. denied* 426 U.S. 934 (1976). Preservation and restoration of the status quo are appropriate considerations in granting a Section 10(j) injunction. *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1575 (7th Cir. 1996); *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975). *See also, Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 299-300 (7th Cir. 2001); *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 27-28 (1st Cir. 1986); *Levine v. C&W Mining Co.*, 610 F.2d 432, 437 (6th Cir. 1979). These inquiries, however, are usually beyond the scope of the underlying administrative hearing.

As explained in the preceding section of this brief, the purpose of the underlying administrative proceeding is to determine whether the alleged unfair labor practices have *in fact* occurred. Testimony regarding the *effects* of those unfair labor practices is largely irrelevant to the administrative hearing and is, therefore, not necessarily found in the administrative record. Here, the Petitioner alleges that Respondent's unfair labor

practices have had a "chilling" effect on employees' free exercise of their Section 7 rights and will likely render a Board remedy in due course ineffective, a contention that was not relevant to the issues presented to the administrative law judge.[7] Thus, both the Petitioner and the Respondent should be allowed to present evidence, including affidavits or live testimony, to supplement the administrative record and fully address the "just and proper" issue; such evidence is necessary for the Court to properly evaluate the propriety of injunctive relief. At least two circuits have suggested that an evidentiary hearing may be necessary to determine the equitable necessity of Section 10(j) injunctive relief. *See Squillacote v. Food Workers*, 534 F.2d 735, 749 (7th Cir. 1976); *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138, 143 n.5 (3d Cir. 1975)

III. CONCLUSION

The Court can resolve any "reasonable cause" issues based on the ALJ record alone, allowing for efficient litigation of these issues and the best use of the Court's time and resources, consistent with case precedent and the legislative intent of Section 10(j). While the record in the administrative hearing is sufficient to resolve "reasonable cause" issues, that record does not address whether injunctive relief is "just and proper" here. Accordingly, the Court should limit the admission of evidence regarding reasonable

[7] *See, e.g., Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878-79 (3d Cir. 1990) ("chilling" impact upon employees justified grant of 10(j) injunction).

cause to the administrative record, but grant the parties leave to supplement the administrative record with evidence to address the "just and proper" issue.

DATED AT Denver, Colorado, this ____ day of August 2____.

Respectfully Submitted,

PETITIONER: B. ALLAN BENSON, REGIONAL REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, REGION 27

By: _____

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APPENDIX K

APPENDIX K-4

ARGUMENT TO SUPPORT MOTION TO DISTRICT COURT TO TRY l0(j) OR l0(l) PETITION ON BASIS OF AFFIDAVITS AND/OR ALJ HEARING TRANSCRIPT AND EXHIBITS[1]

> [The Region should first discuss (or briefly review) the statutory scheme under the Act for Section l0(j) or l0(l) (see Appendix D of this Manual for the Section 10(j) standards by circuit), and the statutory priority of these petitions in the U.S. district courts under 28 U.S.C. Section l657(a). The Region should then argue that the court can both expedite the proceeding and conserve the resources of the court and the parties by hearing the case on affidavits and/or on the evidentiary record developed in the administrative hearing before an ALJ. The following analysis will support the contention that neither the Act nor the Federal Rules of Civil Procedure require a full evidentiary hearing.]

In light of this statutory scheme, it is well settled that district courts in proceedings under Section l0(j) or l0(l)[2] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe **[or, a likelihood of success in proving]** that the respondent has violated the Act.

Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and

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[1] **[Regions litigating l0(j) cases should be prepared to present live testimony supporting the need for injunctive relief, particularly in the Third and Seventh Circuits. See n. 4, infra.** ***Moreover, before litigating a 10(j) case in the Seventh Circuit on the basis of affidavits, telephonic advice should be sought from the Injunction Litigation Branch).*** **See** ***Squillacote v. Farah Supermarkets, Inc., d/b/a Meat Processors of Green Bay,*** **No. 76-1955 (7th Cir. November 16, 1976) (unpublished) (denying petition for rehearing panel decision vacating** ***Gissel*** **10(j) decision where there was no full evidentiary hearing before district court).]**

[2] Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB to seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., *Hirsch v. Building and Construction Trades Council*, 530 F.2d 298, 302 (3d Cir. 1976).

should accept the reasonable inferences he draws therefrom if they are "within the range of rationality". *Seeler v. The Trading Port, Inc.*, 5l7 F.2d 33, 36-37 (2d Cir. l975) (Sec. l0(j)); *Squillacote v. Graphic Arts International Union*, 540 F.2d 853, 858-859 (7th Cir. 1976)(Sec. l0(l)).

Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof",[3] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" **[or, a likelihood of success on the merits]** has been established, (see *Dunbar v. Landis Plastics, Inc.*, 977 F.Supp. 169, 177 (N.D.N.Y. 1997), reconsideration denied 996 F.Supp 174 (N.D.N.Y. 1998), remanded on other grounds 152 F.3d 917 (2nd Cir. 1998); *Gottfried v. Samuel Frankel*, 818 F.2d 485, 493 and 494 (6th Cir. 1984) (Sec. 10(j)); *Pye v. Teamsters Local Union No. 122*, 875 F.Supp 921, 928 (D.Mass. 1995), aff'd 61 F.3d 1013 (1st Cir. 1995); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 546 (9th Cir. 1969) (Sec. 10(l))[4] or to resolve credibility conflicts in the evidence. *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996).

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" **[or, likelihood of success]**determinations in

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[3] *Kobell v. Suburban Lines, Inc.* , 73l F.2d 1076, l084 (3rd. Cir. 1984); *Levine v. C & W Mining Co.*, 6l0 F.2d 432, 435 (6th. Cir. 1979); *Gottfried v. Samuel Frankel*, 818 F.2d 485, 493 (6th. Cir. 1987); *Aguayo v. Tomco Carburetor, Inc.*, 853 F.2d 744, 748 (9th Cir. 1988).

[4] **[Regions: Compare *Eisenberg v. The Hartz Mountain Corp.*, 5l9 F.2d l38, l43 n. 5 (3d Cir. l975) (suggests need for oral testimony in l0(j) cases, at least with respect to "equitable necessity" of injunctive relief). But see *Squillacote v. Local 248, Meat & Allied Food Wkrs.*, 534 F.2d 735, 749 (7th Cir. l976) (limiting *Hartz Mountain*). See also, *SEC v. Frank*, 388 F.2d 486, 490-93 (2d Cir. l968) (suggests that need for full evidentiary hearing depends on extent to which critical facts are in dispute). *NOTE:* If the decision is made to move the district court in a l0(j) case to utilize the ALJ record, the Region should also request the opportunity to supplement the record with either oral testimony or affidavits to prove the need for injunctive relief, i.e., the evidence why a l0(j) decree is "just and proper."]**

Section l0(j) and l0(l) cases upon evidence presented in the form of affidavits. See *Aguayo v. Tomco Carburetor Co.*, 853 F.2d at 750-751; *Squillacote v. Graphic Arts International Union*, 540 F.2d at 860. Accord: *Sharp v. Webco Industries Inc.*, 225 F.3d 1130, 1134 (10th Cir. 2000) (affidavits); *Gottfried v. Samuel Frankel*, 818 F.2d at 493 (combination of affidavits and ALJ transcript); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 4l2 F.2d at 546 (affidavits); *Kennedy v. Teamsters, Local 542*, 443 F.2d 627, 630 (9th Cir. l97l) (same); *Squillacote v. Automobile, Aerospace & Agricultural Implement Workers*, 383 F. Supp. 49l, 493 (E.D. Wis. l974) (same).[5]) *A fortiorari*, reasonable cause **[or, likelihood of success]**determinations can also properly be based upon the transcript of sworn testimony given before an NLRB administrative law judge, subject to cross examination, in the underlying administrative proceeding. See *Silverman v. JRL Food Corp.*, 196 F.3d 334 (2d Cir. 1999); *Gottfried v. Samuel Frankel*, 818 F.2d at 493; *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25-26 (1st Cir. 1986) (combination of live testimony and ALJ transcript); *Fuchs v. Hood Industries, Inc.*, 590 F.2d 395, 398 (1st Cir. l979) (the use of an ALJ transcript "could be of considerable assistance in expediting the work of the [district] court."); *Eisenberg v. Honeycomb Plastics Corp.*, 125 LRRM 3257, 3262 (D. N.J. 1987).[6] There is particularly no need for additional testimony since the ALJ record is the only evidence the Board will have in determining the final outcome of the case. See *NLRB v. Johnson*, 310 F.2d 550, 552 (6th Cir. 1962); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977).

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[5] See generally *F.T.C. v. Rhodes Pharmacal Co.*, l9l F.2d 744 (7th Cir. l95l); *U.S. v. Wilson Williams, Inc.*, 277 F.2d 535 (2d Cir. l960); *Johnston v. J.P. Stevens & Company, Inc.*, 34l F.2d 89l (4th Cir. l965). [But see n. 1 supra.]

[6] In *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d l047, l050-5l (2d Cir. l980), the Second Circuit affirmed a Section l0(j) injunction issued by a district court on the basis of the transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding.

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, *Silverman v. Red & Tan Charters, Inc.*, 1993 WL 498062 (S.D.N.Y. Nov. 30, 1993)[7] (declining to find that Rule 65 requires the holding of an evidentiary hearing on a Section 10(j) petition); *Kennedy v. Sheet Metal Workers*, 289 F. Supp. 65, 87-9l (C.D. Cal. l968),[8] and such procedures do not deny a fair hearing or due process to the Respondent. See *Aguayo v. Tomco Carburetor Co.*, 853 F.2d at 750-751; *Asseo v. Pan American Grain Co.*, 805 F.2d at 25-26; *Gottfried v. Samuel Frankel*, 818 F.2d at 493; *Squillacote v. Graphic Arts International Union*, 540 F.2d at 860; *Kennedy v. Teamsters, Local 542*, 443 F.2d at 630; *San Francisco-Oakland Newspaper Guild v. Kennedy*, 4l2 F.2d at 546.

In sum, submission of this Section [l0(j) or l0(l)] matter **[on the affidavits and exhibits submitted by the Board and the Respondent and/or on the transcript of the testimony and exhibits adduced in the administrative proceeding, supplemented by "just and proper" affidavits or testimony]** will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section l657(a) and the original intent of the l947 Congress which enacted Section [10(j) or 10(l)]. See I *Legislative History LMRA 1947* 414, 433 (Government Printing Office l985). **[Add if appropriate, and see notes 1 and 4, supra.:** If the Court grants this motion to utilize the record developed before the administrative

[7] The Region should refer to its Local Rules in citing to cases that are only cited in Westlaw.

[8] There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d at 546.

law judge, Petitioner also requests that the Court grant leave to supplement such record with either oral testimony or affidavit evidence bearing on the issue of the equitable necessity of injunctive relief in this case, as such evidence may not be germane in the administrative proceeding.**]**

APPENDIX L

QUESTIONS BY THE COURT AND POSSIBLE ANSWERS IN SECTION 10(j) PROCEEDINGS

Counselor, where is this case before the Board?

- Tell court at what stage the proceeding is.

- If court is unclear about what this means, explain process of Board: Board order not self-enforcing, ALJ makes recommendation only, then Board order takes time.

- Tell court that Board rules (102.94(a)) require 10(j) cases be expedited, that General Counsel has put the case on the fast track, and that General Counsel won't agree to any continuances or postponements.

- Be careful not to criticize the Board.

Why can't the Board take care of these problems without this court getting involved?

- Section 10(j) is complement to administrative process.

- Section 10(j) enables district court to preserve Board's remedy during lengthy administrative process (which you have described to judge).

- Explain what harm to statutory rights/collective-bargaining will occur in the interim without 10(j) relief.

Why should I grant extraordinary relief when the Board is dragging its feet?

- Board has not caused delay in this case, e.g. pattern of violations emerged over time, describe time frame of pattern briefly, including most recent violations. Board needs time to investigate adequately.

- Where appropriate, violations are of continuing nature.

- Even if administrative delay, it should not be grounds to deny 10(j): (1) Delay only significant if prevents injunctive relief from being effective; (2) Delay punishes innocent employees who are trying to exercise their statutory rights.

These allegations occurred a number of months ago. Hasn't the damage already been done? What good will an injunction do now?

- Still a long time until Board issues order, which is not self-enforcing. There is still enough time for remaining employees to revive the Union. There may be some damage, but union support not dead. It is more effective to restore employee support now than much later when Board issues order.

- A union ordinarily doesn't have resources to keep an organizing drive going throughout the time the case is pending before the Board. Section 10(j) relief allows the Union campaign to go forward now while some support for the Union still exists rather than at the end of Board proceedings when the Union would have to start over.

- Court should not penalize innocent employees for passage of time.

Hasn't the unlawful conduct by the Company stopped at this point?

- The Company has effectively ended the union campaign and does not need to continue its unlawful conduct.

Whose rights are we protecting?

- We are trying to vindicate public interest to promote the collective-bargaining process which the NLRA is designed to protect.

- If Respondent is permitted to litigate the unfair labor practice charge for say, several years, it is effectively insulated by its own misconduct. Congress did not intend the passage of time to reward the employer for its wrongdoing.

What about the rights of replacements who have been hired?

- Statutory rights of discriminatees outweigh private job rights of replacements.

- In strike situations, replacements have no expectation of permanent employment since they knew what they were getting into when they were hired.

If I grant the injunction, isn't the fight over? Aren't you really seeking a disposition of the case here rather than with the Board?

- No, the Board is not seeking a permanent order, only a temporary injunction until the Board has time to decide the case. The injunction expires upon the issuance of a Board order.

- We are not asking you to change anything, merely to put the situation temporarily back the way it should have been before the Respondent committed these unfair labor practices

- In bargaining order cases, the court is not imposing any agreement. The parties must bargain in good faith, they need not reach agreement on any terms. If they do reach agreement, they can condition it on the outcome of the Board's order.

- The real question is whether a bargaining order down the road will be effective? It is not. The Employer has stymied the collective-bargaining process.

- In non-majority organizing cases, once a cleansed atmosphere is restored by the injunction, the employees are always free to reject the union through the filing of a petition and holding of an election.

What if the Board ultimately sides with the Respondent? Won't the injunction have significantly harmed the Respondent?

- We view that as only a slight chance in this case. The Board itself authorized the General Counsel to seek this injunction. Board will likely find Respondent to be a wrongdoer, and the wrongdoer should bear the burden of ambiguity here.

- The risk of error is much higher if nothing is done now, more onerous to employees and union if no injunction is granted. Once the Board issues an order, it cannot effectively revise the union and employee statutory rights have been effectively obliterated by the Employer's misconduct.

- If reinstatement sought, the Company will have the use of employees' services during this period of time, therefore no harm. The Employer will be able to operate its business and manage its workforce so long as it does not violate the NLRA.

- If bargaining order, any agreement can be conditioned on the outcome of a Board order. If parties don't agree, the Employer can implement its final offer to the Union.

- If order to turn over proprietary information, court can issue protective order. The Employer can't forestall bargaining by refusing to provide relevant information.

Aren't these injunctions reserved for only extraordinary cases? I don't see how this case is so special or different from other cases.

- To show why this case is unique, explain the need for relief in this case.

- Board sought Section 10(j) injunctions in less than 2% of all cases where complaints issued. On average the Board issues about 3,500 complaints a year, and in the last two years (1997-1998), the Board authorized Section 10(j) petitions in only 50 cases per year. These are cases where the Board is most concerned about the effectiveness of its remedy. Based on these numbers, one could argue that 10(j) cases are all "extraordinary".

APPENDIX L

Why is a reinstatement order necessary if discharged employees now have better jobs?

- Even if the discriminatees don't accept reinstatement, the remaining employees working for the Employer will know that the discharged employees had a choice whether or not to return and that the Employer is not free to discriminatee against them because they supported the Union.

- Circumstances may change suddenly for discriminatees, and they may desire to return to their jobs with Respondent.

Why do you need a reinstatement order? Why isn't a cease-and-desist order enough? There are other Union supporters in the workplace.

- Reinstatement is necessary to protect the statutory rights of other employees working at the facility.

- Reinstating the Union leaders and/or supporters sends an important message to other employees who fear losing their jobs if they support the Union, and who are very vulnerable to the Company's misconduct. Reinstatement tells employees that the Company cannot discriminate against them for supporting the Union.

- The fact that other employees have signed Union authorization cards doesn't mean that they will continue to support the Union, especially in the face of the Company's discharges and other unfair labor practices.

- Reinstatement restores the necessary Union leadership to jump-start the Union's campaign and/or representation which the Company has undermined.

If I put these people back to work, why do you need a bargaining order? Can't the Union go to an election?

- Explain need for Gissel bargaining order, especially that the unfair labor practices are hallmark violations, which undermine majority and devastate free choice.

- Bargaining order will prevent further erosion of the Union's support and strength pending a Board order. Without a bargaining order, Union will continue to weaken over time and be unable to effectively represent employees in collective-bargaining negotiations once a Board order finally issues.

- The Company's unfair labor practices have caused employees to lose negotiated benefits they would have received had the Union been elected during this interim period and bargained with the Company. These potential lost benefits cannot be measured in dollars or remedied by the final Board order.
-

APPENDIX L

IN "REASONABLE CAUSE" CIRCUITS

Are you saying that the reasonable cause standard requires this court to rubber stamp what the Board wants here?

- Board not asking court to be "rubber stamp", but threshold of proof under reasonable cause is low and the court should give deference to the Regional Director's evidence and theory of violation. Under reasonable cause, question is whether we have presented enough evidence that Board could find violation. Is limited inquiry, not the absence of any inquiry.

- The more significant inquiry is into just and proper, i.e. whether there is a need for interim relief because, without it, the Board's order won't have any meaning several years down the road.

Doesn't this court have to weigh the equities in this case?

- A Section 10(j) injunction is an equitable remedy. The just and proper standard permits some inherent weighing of equities.

- Several circuits apply traditional equitable criteria, but the law in this circuit is clear that strict adherence to equitable principles is not the test.

Are you telling me that I can't resolve credibility?

- This court does not have to take on the burden of deciding credibility. Explain standard: within range of rationality, if there is an objective basis to credit General Counsel's evidence.

- Question is whether there is reasonable cause to believe that Board will decide credibility in favor of General Counsel, not who should be believed.

- Defer to Regional Director's version of the facts if within the range of rationality.

APPENDIX M

OPPOSITION TO INTERVENTION BY CHARGING PARTIES

APPENDIX M

APPENDIX M-1

SAMPLE ARGUMENT TO SUPPORT A MOTION TO OPPOSE INTERVENTION

INCLUDING THE BOARD'S EXCLUSIVE AUTHORITY TO SEEK SECTION 10(J) AND 10(L) INJUNCTIONS AND THE AUTHORITY TO SEEK CONTEMPT UNDER 10(J) AND 10(L) DECREES

In seeking temporary injunctive relief under Section 10(j) and 10(l) of the Act, the NLRB acts solely "in the public interest and not in vindication of purely private rights." Senate Report No. 105 on S.1126, 80th Cong., 1st Sess., (April 17, 1947), reprinted in I *Legislative History LMRA 1947* 414 (G.P.O. 1985). See, e.g., *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 39-40 (2d Cir. 1975) (Section 10(j)); *Hendrix v. Operating Engineers Local 571*, 592 F.2d 437, 441-42 (8th Cir. 1979) (Section 10(l)). It is thus well established that the right to seek a temporary injunction to enjoin unfair labor practices pursuant to Section 10(j) or 10(l) of the Act is *exclusively* within the authority of the Board. See *Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511, 516-17 (1955).[1] In this regard, a proposed amendment to Section 10(l) of the Act to allow private parties to seek directly in the district courts injunctive relief for certain unfair labor practices, was defeated by the 1947 Congress which enacted Section 10(l) and 10(j). See *Muniz v. Hoffman*, 422 U.S. 454, 465-67 (1975) (discussion of legislative history).

[1] Accord: *Walsh v. I.L.A.*, 630 F.2d 864, 871-72 (1st Cir. 1980); *California Assoc. of Employers v. BCTC of Reno, Nevada*, 178 F.2d 175 (9th Cir. 1949); *Amalgamated Assoc. of Street and Motor Coach Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902 (8th Cir. 1948); *Amazon Cotton Mill Company v. Textile Workers Union of America*, 167 F.2d 183 (4th Cir. 1948); *Brown & Sharpe Mfg. Co. v. District 64, IAM*, 535 F.Supp. 167, 169 n. 2 (D. R.I. 1982).

It is also well established that a private party cannot intervene by right (see Fed.R.Civ.P. 24(a)(2)) in such proceedings in the district court, *Sears, Roebuck & Co. v. Carpet, etc. Union*, 410 F.2d 1148, 1150-51 (10th Cir. 1969), vacated on other grounds as moot, 397 U.S. 655 (1970),[2] for to do so would interfere with the exclusive jurisdiction which has been vested in the NLRB by Congress and would give such party a right independently to appeal or to seek a contempt citation. See *Penello v. Burlington Industries, Inc.*, 54 LRRM 2165 (W.D. Va. 1963). See also *McLeod v. Business Machine Conference Board*, 300 F.2d 237, 242-43 (2d Cir. 1962) (charging party not permitted to raise issues in 10(l) proceeding which are not raised by the Regional Director). In addition, a private party cannot intervene in such proceedings at the appellate level. See *Hirsch v. Building and Construction Trades Council of Phila. & Vicinity, AFL-CIO*, 530 F.2d 298, 307-08 (3d Cir. 1976).[3]

It is similarly well established that the right to seek contempt of a court decree enforcing a NLRB order resides exclusively in the NLRB, inasmuch as the NLRB seeks judicial enforcement of its orders as a "public agent." See *Amalgamated Utility Workers*

[2] Accord: *Squillacote v. Local 578, Auto Workers*, 383 F.Supp. 491, 492 (E.D. Wisc. 1974); *Wilson v. Liberty Homes, Inc.*, 500 F.Supp. 1120, 1123 (W.D. Wisc. 1980), affd. as mod. 108 LRRM 2699 (7th Cir. 1981), vacated as moot 109 LRRM 2492, 673 F.2d 1333 (7th Cir. 1982); *Reynolds v. Marlene Industries Corp.*, 250 F.Supp. 722, 723-24 (S.D. N.Y. 1966); *Philips v. Mine Workers, District 19*, 218 F.Supp. 103, 105-06 (E.D. Tenn. 1963); *Boire v. Pilot Freight Carriers, Inc.*, 86 LRRM 2976, 2978 (M.D. Fla. 1974), aff'd. 515 F.2d 1185 (5th Cir. 1975), reh. denied, 521 F.2d 795, cert. denied, 426 U.S. 934 (1976).

[3] Accord: *Solien v. Miscellaneous Drivers etc.*, 440 F.2d 124, 129-32 (8th Cir. 1971), cert. denied 403 U.S. 905; *Henderson v. Operating Engineers, Local 701*, 420 F.2d 802, 806 fn. 2 (9th Cir. 1969); *Compton v. N.M.U.*, 533 F.2d 1270, 1276 fn. 4 (1st Cir. 1976).

v. Consolidated Edison Company of New York, Inc., 309 U.S. 261, 269 (1940); *May Department Stores Co. v. NLRB*, 326 U.S. 376, 388 (1945).[4]

Since the NLRB similarly acts to vindicate solely the public interest under Section 10(j) and 10(l) of the Act, see *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988) and cases cited therein, the right to seek a contempt adjudication of an order granting a temporary injunction pursuant to Section 10(j) or 10(l) of the Act similarly resides exclusively in the NLRB. See *Shore v. Building and Construction Trades Council*, 50 LRRM 2139 (W.D. Pa. 1962) (motion by nonparty employer in 10(l) proceeding to adjudicate respondent union in contempt, denied on basis that only NLRB can bring contempt action; Fed.R.Civ.P. 71 held not applicable).[5] Thus, while the courts have the inherent power to enforce compliance with their lawful orders through civil contempt, e.g., *Shillitani v. U.S.*, 384 U.S. 365, 370 (1966), charging parties may not be permitted to pursue independently contempt petitions in 10(l) and 10(j) cases which would intrude upon the Board's exclusive authority to initiate and enforce these types of

[4] See also *NLRB v. Shurtenda Steaks, Inc.*, 424 F.2d 192 (10th Cir. 1970); *Vapor Blast Shop Worker's Association v. Simon*, 305 F.2d 717 (7th Cir. 1962); *NLRB v. Retail Clerks International Association*, 243 F.2d 777 (9th Cir. 1956).

[5] See also *Moore v. Tangipahoa Parish School Board*, 625 F.2d 33, 34 (5th Cir. 1980)(Fed.R.Civ.P. 71 does not allow a nonparty to enforce a court decree where such person has no standing to sue). Cf. *Evans v. International Typographical Union*, 81 F. Supp. 675, 678 (S.D. Ind. 1948) (power to initiate and prosecute temporary injunction proceeding under Section 10(j) carries with it the incidental and inherent authority to institute contempt proceedings).

proceedings. See *Shore v. Building and Construction Trades Council*, 50 LRRM at 2141. Accord: *Philips v. Mine Workers, District 19*, 218 F.Supp. at 107-08 (charging party has no right to continue 10(l) decree or to seek contempt adjudication over objection of Regional Director).[6]

[6] Compare the Ninth Circuit's decision in *NLRB v. Retail Clerks International*, 243 F.2d at 782-83 (charging party has no standing to seek injunctive relief to enforce prior court decrees where Board was not seeking such relief) with *Retail Clerks v. Food Employers Council*, 351 F.2d 525, 529 (9th Cir. 1965) (district court has jurisdiction, once Regional Director files 10(l) petition, to grant appropriate relief different from that proposed by the Regional Director).

APPENDIX M

APPENDIX M-2

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-4 June 3, 1999

TO: All Regional Directors, Officers-in-Charge
And Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Participation by Charging Parties in Section 10(j)Injunction and Section 10(j) Contempt Proceedings

1. Introduction

The purpose of this Memorandum is to detail the degree to which charging parties in the underlying unfair labor practice proceeding may participate in the U.S. district court Section 10(j) injunction proceeding. Charging parties in Section 10(j) proceedings should be given the same rights as charging parties in 10(l) proceedings: the "opportunity to appear by counsel and present any relevant testimony." Section 10(l), 29 U.S.C. 160(l). This participation does not, however, include the right to formally intervene as a party in the 10(j) proceeding. It is more analogous to that of an active amicus curiae.

Such participation should apply not only to the initial 10(j) proceeding which seeks the temporary injunction, but also to any subsequent proceedings to modify, amend, reconsider or to oppose a stay of any decree obtained, and any contempt proceeding which seeks a civil contempt adjudication and purgation order.[1]

Set forth below is the legal analysis in support of the argument that charging parties should be denied formal intervention as parties in the injunction proceeding, as well as that supporting the position that charging parties in 10(j) proceedings should be accorded the right of participation due to charging parties in Section 10(l) proceedings. Any charging party motion to intervene should be opposed and any charging party motion for amicus status should be supported, relying upon the analysis set forth below.

2. The Legislative History of Section 10(j) and the Policies under the Federal Rules Demonstrate that Charging Parties Have No Right to Intervene in 10(j) and 10(l) Proceedings.

In seeking temporary injunctive relief under Section 10(j), the National Labor Relations Board (NLRB or Board) acts solely "in the public interest and not in vindication of purely private rights." Senate Report No. 105 on S.1126, 80th Cong., 1st Sess., p. 8 (April 17, 1947), reprinted in I *Legislative History LMRA 1947* 414

[1] Similarly, charging parties should be granted amicus status in any appeal.

(Government Printing Office 1985).[2] Thus, it is well established that the right to seek a temporary injunction to enjoin unfair labor practices pursuant to Section 10(j) is exclusively within the authority of the Board. See *Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511, 516-517 (1955).[3] Indeed, during the debate on Section 10(j) and (l) in 1947, Congress defeated a proposed amendment to Section 10(l) to allow private parties direct access to the district courts to seek injunctive relief for certain unfair labor practices. See *Muniz v. Hoffman*, 422 U.S. 454, 465-467 (1975)(discussing legislative history of Taft-Hartley Amendments). Since intervention would permit a party independently to appeal or to seek a contempt citation, granting intervention would inappropriately interfere with the Congressional intent to vest in the Board the exclusive authority to prosecute injunction proceedings. *Penello v. Burlington Industries, Inc.*, 54 LRRM 2165 (W.D. Va. 1963). See also *Sears, Roebuck & Co. v. Carpet, etc. Union*, 410 F.2d 1148, 1150-1151 (10th Cir. 1969), vacated on other grounds as moot, 397 U.S. 655 (1970) (denying intervention at appellate level); *Philips v. Mineworkers*, 218 F. Supp. 103, 105-106 (E.D. Tenn. 1963) (denying intervention for purposes of dissolving the injunction and instituting contempt proceedings).

Courts have also reasoned that because the statutory power to petition for 10(j) and 10(l) relief is limited to the Board, a charging party has no independent interest protectable by intervention under Fed.R.Civ.P., Rule 24(a)(2) or (b)(2). Accordingly, courts have routinely denied charging parties motions to intervene under that Rule. *Reynolds v. Marlene Industries Corp.*, 250 F. Supp. 722, 723-724 (S.D.N.Y. 1966); *Boire v. Pilot Freight Carriers, Inc.*, 86 LRRM 2976, 2978 (M.D. Fla. 1974), aff'd. 515 F.2d 1185 (5th Cir.), reh. denied, 521 F.2d 795 (1975), cert. denied 426 U.S. 934 (1976); *Squillacote v. Local 578, Auto Workers*, 383 F. Supp. 491, 492 (E.D. Wisc. 1974); *Wilson v. Liberty Homes, Inc.*, 500 F. Supp. 1120, 1123 (W.D. Wisc. 1980).[4]

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[2] See also *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 40 (2d Cir. 1975).

[3] Accord: *Walsh v. I.L.A.*, 630 F.2d 864, 871-872 (1st Cir. 1980); *California Assoc. of Employers v. BCTC of Reno, Nevada*, 178 F.2d 175, 179 (9th Cir. 1949); *Amalgamated Assoc. of Street and Motor Coach Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902, 907 (8th Cir. 1948); *Amazon Cotton Mill Company v. Textile Workers Union of America*, 167 F.2d 183, 185-187 (4th Cir. 1948); *Brown & Sharpe Mfg. Co. v. District 64, IAM*, 535 F. Supp. 167, 169 n. 2 (D. R.I. 1982).

[4] Other district courts have denied intervention without reference to Rule 24. See, *NLRB v. Ona Corp.*, 605 F. Supp. 874, 876 (N.D. Ala. 1985); *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1163, 1164 (E.D. Mich. 1979), affd. 615 F.2d 1360 (6th Cir. 1980)(table). Other appellate courts have also denied intervention. See, *Hirsch v. Building and Construction Trades Council of Phila. & Vicinity, AFL-CIO*, 530 F.2d 298, 307-308 (3d Cir. 1976); *Compton v. N.M.U.*, 533 F.2d 1270, 1276 n. 4 (1st Cir. 1976); *Solien v. Miscellaneous Drivers etc.*, 440 F.2d 124, 129-132 (8th Cir.), cert. denied 403 U.S. 905 (1971); *Henderson v. Operating Engineers, Local 701*, 420 F.2d 802, 806 n. 2 (9th Cir. 1969).

3. Charging Parties in Section 10(j) Proceedings Should Enjoy the Same Rights of Participation as in Section 10(l) Proceedings

Section 10(l) expressly directs that charging parties "shall be given an opportunity to appear by counsel and present any relevant testimony." Given the functional similarity of section 10(j) and 10(l)[5] it is appropriate to accord the same degree of participation to charging parties in 10(j) proceedings. Such participation comes under the general rubric of an amicus curiae, a status courts have often granted to charging parties in Section 10(j) cases.[6] Often the court has granted the charging party amicus the same privileges as would be granted under 10(l).[7]

[5] The two provisions were enacted as companion provisions: section 10(l) mandates the Board to seek injunctive relief in cases involving certain enumerated unfair labor practices (chiefly, unlawful secondary boycotts); 10(j) authorizes the Board, in its discretion, to seek injunctive relief in all other cases. The standards for determining the propriety of injunctive relief are generally the same. *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1084 (3d Cir. 1984); *Kinney v. Local 150*, 994 F.2d 1271, 1276 (7th Cir. 1993). Although one court has held that the absence of any reference in 10(j) to charging party participation distinguishes it from 10(l) (see *Wilson v. Liberty Homes, Inc.*, 500 F. Supp. at 1123), that view has not been adopted generally and that decision has not been read as a rejection of all right to participate in 10(j) proceedings. See *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. 174, 179-180 (N.D.N.Y. 1998), remanded on other grounds 152 F.3d 917 (2d Cir. 1998) (table) (distinguishing *Liberty Homes* and granting amicus curiae status to charging party).

[6] See, e.g., *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. at 179-180; *D'Amico v. United States Service Industries, Inc.*, 867 F. Supp. 1075, 1079 (D. D.C. 1994); *Garner v. Macclenny Products, Inc.*, 859 F. Supp. 1478, 1479 (M.D. Fla. 1994); *Zipp v. Caterpillar, Inc.*, 858 F. Supp. 794, 795 (C.D. Ill. 1994); *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1163, 1164 (E.D. Mich. 1979), aff'd. 615 F.2d 1360 (6th Cir. 1980); *NLRB v. Ona Corp.*, 605 F. Supp. 874, 876 (N.D. Ala. 1985); *McLeod v. General Electric Company*, 257 F. Supp. 690, 692 n. 1 (S.D.N.Y.), revd. on other grounds 366 F.2d 847 (2d Cir. 1966), stay granted 87 S.Ct. 5, vacated and remanded 385 U.S. 533 (1967).

[7] See *McLeod v. General Electric Company*, 257 F. Supp. at 692, n. 1 (may appear by counsel, examine and cross examine witnesses and make legal submissions); *NLRB v. Ona Corp.*, 605 F. Supp. at 876 (afforded full opportunity to be heard, to examine and cross-examine witnesses and present evidence bearing upon the issues); *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. at 180 (permitted to file memoranda and evidentiary affidavits and to participate in oral argument).

To be sure, a 10(j) charging party amicus, like the 10(l) charging party, is not a full party in the district court proceeding[8] and may not vary the theory of violation being advanced by the Regional Director or initiate an appeal.[9]

4. Charging Party's Right of Participation Extends to Section 10(j) Civil Contempt Proceedings

The right to institute proceedings for civil contempt of a temporary interim injunction resides exclusively in the NLRB as a "public agent;" a charging party has no independent authority to bring contempt proceedings. *Shore v. Building and Construction Trades Council,* 50 LRRM 2139 (W.D. Pa. 1962). See also *NLRB v. Retail Clerks International Association,* 243 F.2d 777, 782-783 (9th Cir. 1956) (charging party has no standing to seek injunctive relief to enforce prior court decrees where Board was not seeking such relief); *Philips v. Mine Workers, District 19,* 218 F. Supp. at 107-108 (charging party has no right to continue 10(l) decree or to seek contempt adjudication over objection of Regional Director); *Moore v. Tangipahoa Parish School Board,* 625 F.2d 33, 34 (5th Cir. 1980) (Fed.R.Civ.P. 71 does not allow a nonparty to enforce a court decree where such person has no standing to sue). However, consistent with the general policy set forth above, Regions should consent to the participation of charging parties as amicus curiae in Section 10(j) civil contempt proceedings.

5. Conclusion

Consistent with the analysis set forth above, the Regions should deny all requests and oppose all motions of charging parties to obtain formal party status in any Section 10(j) proceeding. However, the Regions should consent to granting the charging parties the status of amicus curiae and the same degree of participation granted to charging parties under Section 10(l) of the Act.

If the Regions have any questions concerning this guideline memorandum, or if issues arise not clearly covered herein, prompt telephonic advice should be sought from the Injunction Litigation Branch in Washington.

F. F.

cc: NLRBU
Release to the Public

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[8] See rationale above p.307, for denying intervention by charging parties. See also *The Miller-Wohl Co., Inc. v. Commission of Labor and Industry, State of Montana,* 694 F.2d 203, 204 (9th Cir. 1982) (amici are not parties; grant of motion to intervene is necessary to confer party status); *Morales v. Turman,* 820 F.2d 728, 732 (5th Cir. 1987) (same).

[9] See *McLeod v. Business Machine Conference Board,* 300 F.2d 237, 242-243 (2d Cir. 1962); *Sears Roebuck & Co. v. Carpet, etc. Union,* 410 F.2d at 1150-1151. See also *Moten v. Bricklayers, Masons, etc.,* 543 F.2d 224, 227 (D.C. Cir. 1976) (where litigant did not seek intervention, its position was analogous to amicus; as such it had no authority to appeal); *Richardson v. Alabama State Board of Education,* 935 F.2d 1240, 1247 (11th Cir. 1991) and cases cited (refusing to consider arguments of amici not presented by party).

APPENDIX N

DISCOVERY DOCUMENTS

APPENDIX N

APPENDIX N-1

MODEL MOTION FOR PROTECTIVE ORDER TO LIMIT DISCOVERY PURSUANT TO FED. R. CIV. P. 26(C)(1)

Comes now counsel for the Petitioner, ___, Regional Director for the __ Region of the National Labor Relations Board (Board), and pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure, moves the Court for a Protective Order to Limit Discovery by the Respondent, _____. In support of this Motion, counsel for Petitioner states the following:

1. On ____, the Petitioner filed a Petition for Temporary Injunctive Relief pursuant Section 10(j) **[**or 10(l)**]** of the National Labor Relations Act, as amended (Act), 29 U.S.C. Section 160(j) [or (l)]. The Petition is based upon an unfair labor practice complaint **[**or charge**]** against Respondent which issued **[**or was filed**]** in NLRB Case ___, pursuant to Section 10(b) of the Act, 29 U.S.C. Section 160(b). A hearing has **[**not**]** been scheduled by the Court **[**for ___,**]** at which time **[**When a hearing is scheduled**]** the Respondent is to show cause why, pending before the Board, Respondent should not be temporarily enjoined or restrained in the manner prayed for in said Petition.

2. The limited legal issues before the Court in this proceeding are chiefly whether there is "reasonable cause" to believe **[or: a likelihood of success in proving]** that Respondent has violated and is violating the Act, 29 U.S.C. Section 151 et seq., and whether Petitioner's requested temporary injunctive relief is "just and proper" under the circumstances. This proceeding is to be given expedited consideration by the Court pursuant to 28 U.S.C. Section 1657(a), as well as the Congressional purpose underlying Section 10(j) **[**or 10(l)**]** of the Act.

3. On ___, counsel for Petitioner was served by Respondent with a Notice of Deposition **[**Request for Interrogaties, etc.**]**, a copy of which is attached hereto as Petitioner's Exhibit A.

4. The Notice of Deposition **[**Request for Interrogatories, etc.**]** issued to Petitioner requests at **[**cite to particular section or question**]** testimony or documents that are either privileged by the attorney work product rule, or that essentially deal with, inter alia, the scope or adequacy of the investigation conducted in NLRB Case ___ by the Board's Regional Office, allegations of selective prosecution by the Board in initiating this proceeding, as well as the mental processes and deliberations of, and communications among, the Petitioner, the Board's General Counsel, 29 U.S.C. Section 153(d), and the five-member Board itself, 29 U.S.C. Section 153(a).

5. Except as noted infra, in order to expedite this discovery process and thereby preclude any undue delay in the hearing on this Petition, Petitioner is prepared to waive **[**in part**]** its attorney work product privilege as to **[**certain of**]** the investigatory affidavits of witnesses. Petitioner will expeditiously produce for discovery to Respondent not only all copies of all documentary evidence and exhibits contained in the Regional Office's investigatory file in NLRB Case ____, other than internal Regional Office, Office of the General Counsel or Board communications or memoranda, but will also transmit copies of all witness affidavits in the possession of the Regional Office **[**of all persons Petitioner intends to call as witnesses in the hearing before the District Court in this proceeding.**]**.[1]

6. Petitioner submits that all other **[**witness affidavits,**]** memoranda, documents of testimony requested by Respondent in its Notice of Deposition **[**Request for Interrogatories, etc.**]** described above in paragraph 4 that concern matters other than the evidence in Petitioner's possession as described in paragraph 5 above, are **[**either subject

[1] **[*Note: The Regions should normally offer to waive in part the attorney work product privilege only as to those affidavits of persons the Board intends to call as witnesses at the hearing on the petition. Affidavits of other persons whom the Board does not intend to call as witnesses before the district court should not normally be produced for discovery. However, where the Respondent's discovery request clearly includes material covered by such other persons, then the Region should offer to produce in discovery even the affidavits of persons the Region does not intend to call as witnesses at the hearing.]**

to Petitioner's claim of attorney work product privilege, or**] [**are**]** not subject to discovery under Rule 26(b) of the Federal Rules of Civil Procedure, because they concern matters not germane to the limited issues properly to be considered by the Court under the statutory scheme of Section 10(j) **[**or 10(l)**]** of the Act.

7. Petitioner further submits that the requested deposition of Petitioner Regional Director **[**Petitioner's response to Respondent's interrogaties**]** would serve no useful purpose under the discovery provisions of the Federal Rules of Civil Procedure, as the specific allegations of the Petition and the evidence described in paragraph 5 above, which Petitioner is prepared to promptly submit to Respondent, will adequately prepare Respondent to defend against the allegations of the Petition under the statutory scheme of Section 10(j) **[**or 10(l)**]**.

*/8. Petitioner further submits that, in view of the allegations of the Petitioner, particularly paragraphs ___, there is a reasonable possibility that the Petitioner's production for discovery to Respondent of the affidavits of employee witnesses without appropriate protection against future discrimination, intimidation or harassment, may lead to further infringement on the statutory right of these employee witnesses.

Accordingly, consistent with Rule 26(b) of the Federal Rules of Civil Procedure, and pursuant to Rule 26(c)(1) thereof, Petitioner respectfully moves the Court to grant a protective order to limit and control discovery by the Respondent in the follow manner:

1. Paragraph ___ of the Respondent's Notice of Deposition **[**Request for Interrogatories, etc.**]** should be struck and no discovery should be permitted with respect thereto;

2. Respondent's request to depose Regional Director **[**request for interrogatories**]** should be denied;

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*/ **[**Add if appropriate. See memo of points, nn. 14 and 15.**]**

3. Discovery should be directed to proceed expeditiously and should be limited to the Petitioner's transmission to Respondent of copies of all documentary evidence and exhibits contained in the Regional Office's investigatory file in NLRB Case ___, other than internal Regional Office, Office of the General Counsel or Board communications or memoranda, and all witness affidavits in the Regional Office's possession **[**of witnesses whom Petitioner intends to call at the hearing before the Court on the Petition for Temporary Injunctive Relief**]**; and

**/4. Petitioner's production for discovery to Respondent of the affidavits of witnesses should proceed only under certain safeguards on Respondent's use of such affidavits and under particular conditions designed to protect employee statutory rights, as set forth as follows:

a) Respondent's counsel should be prohibited from disclosing or revealing the contents of any affidavits to Respondent, its officers, supervisors or agents, except to the limited extent necessary to allow counsel for Respondent to discuss the allegations set forth in particular affidavits with concerned Respondent officials;

b) Respondent, its officers, supervisors and agents should be prohibited from directly contacting any of the affiants concerning their testimony except via counsel for Petitioner;

c) Counsel for Petitioner should be permitted upon adequate notice to be present at all times during any Respondent interviews with any of the affiants; and

d) Respondent, its officers supervisors and agents should be prohibited from threatening, disciplining, discharging or otherwise affecting in any negative manner the employment status **[**or union membership**]** of any of the affiants without first notifying Petitioner and securing the prior permission of the Court, if said affiants are, become, or seek to become employee **[**or members**]** of Respondent.

/ **[Add if appropriate. See previous footnote**]**

APPENDIX N

Finally, if the Court deems it advisable, Petitioner is prepared to present oral argument on the issues raised by this Motion. A copy of a proposed order limiting discovery is attached hereto for the Court's convenience.

APPENDIX N

APPENDIX N-2

MODEL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER TO LIMIT DISCOVERY PURSUANT TO FED.R.CIV.P. 26(C)(L)

The following arguments should be included in the memorandum of points and authorities submitted to the district court to support a Rule 26(c)(1) motion to limit discovery. Board attorneys should select *only* those arguments that address the request for discovery served by their respondent. Some arguments are bracketed "[]", and should be included only when relevant. Other sections enclosed in brackets are instructional, and should be omitted from any papers filed with the court. References to page numbers within the document are highlighted in bold to assist Board attorneys in updating their final papers before filing with the court.

I. INTRODUCTION

Petitioner seeks a protective order to expedite the discovery process, limit Respondent's discovery to matters that are relevant and not privileged, and control the production of witness affidavits. This proceeding is brought under Section 10(j) of the National Labor Relations Act (Act), 29 U.S.C. § 160(j) **[or (*l*)]** by _____, the Regional Director of Region ____ of the National Labor Relations Board (Board), on behalf of the Board, for temporary injunctive relief to enjoin the Respondent from certain unfair labor practices pending the Board's resolution of an administrative complaint.[1] On ____, the Respondent, _____, served on the Board a request for discovery/notice of deposition consisting of **[describe discovery request]**, attached to Petitioner's Motion as Exhibit A. See Motion, at ¶ 3.

The Court should grant a protective order limiting discovery in this case because extensive discovery is not appropriate given the expedited nature and limited scope of this Section 10(j) proceeding. Moreover, a protective order is warranted to specifically

[1] **[*Set forth the relevant text of Section 10(j) or 10(*l*).]**

preclude discovery of matters that are privileged or irrelevant to the narrow issues before this Court. Finally, in order to expedite discovery and consideration of **his/her** request for temporary injunctive relief, Petitioner will waive certain claims of privilege and, under Court supervision, produce copies of witness affidavits, exhibits, and other documentary evidence that the Board is relying on in this proceeding.

II. EXTENSIVE DISCOVERY IS NOT APPROPRIATE GIVEN THE STATUTORY MANDATE FOR EXPEDITED CONSIDERTION OF THIS SECTION 10(J) PROCEEDING AND THE LIMITED SCOPE OF THE ISSUES BEFORE THIS COURT.

A. Discovery Should Be Limited to Facilitate the Expedited Consideration That Is Statutorily Mandated in Section 10(j) Proceedings.

Under 28 U.S.C. § 1657(a), the district court is required to expedite consideration of a request for temporary injunctive relief.[2] Given the importance of speed in such cases, proceedings for preliminary injunctive relief are often "streamlined[.]"[3] The parties are not expected to be able to "marshall their evidence" as they would for an actual trial, and the courts make decisions based upon administrative records and affidavits.[4] The specific Congressional purpose underlying Section 10(j) **[or 10(*l*)]** -- to

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[2] 28 U.S.C. § 1657(a) provides, in pertinent part, "[n]otwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title, *any action for temporary or preliminary injunctive relief*,. . . ." (emphasis added).

[3] *E.g., South Yuba River Citizens League v. National Marine Fisheries Service*, 257 F.R.D. 609, __ (E.D. Cal. 2009) (citation omitted).

[4] *E.g., South Yuba River Citizens League v. National Marine Fisheries Service*, 257 F.R.D. at __ (E.D. Cal. 2009) (citation omitted) (action for preliminary injunction under the Endangered Species Act); *Kennedy v. Sheet Metal Workers International Association Local 108,* 289 F. Supp. 65, 90-91 (C.D. Cal. 1968) (action for preliminary injunction under Section 10(*l*) of the National Labor Relations Act). **[If citing a Section 10(*l*) case in a 10(j) proceeding, note that Section 10(*l*) of the Act, 29 U.S.C. § 160(*l*), is a**

effect a prompt cessation of unfair labor practices while the administrative proceedings are pending in order to preserve the Board's remedial powers -- also warrants expedited processing of this case.[5] The extensive discovery that the Respondent seeks here would unnecessarily delay this Section 10(j) proceeding and hinder execution of these statutory mandates.[6]

B. Discovery Should Also Be Limited Because the Issues before the Court in this Ancillary Section 10(j) Proceeding Are Quite Narrow.

As discussed in greater detail in Petitioner's memorandum in support of the Section 10(j) **[10(*l*)]** petition, the principal issues before this Court are whether there is "reasonable cause" to believe that Respondent has committed the alleged unfair labor practices, and whether temporary injunctive relief is "just and proper" pending final Board adjudication of the underlying Board proceeding. **[Set forth the Section 10(j)**

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companion provision to Section l0(j) that requires the Board to seek temporary injunctions against specified unfair labor practices, such as secondary boycotts by unions.]

[5] *See, e.g., Miller v. California Pacific Medical Center,* 19 F.3d 449, 455 (9th Cir. 1994) (Section 10(j) enacted "to alleviate the threat that delay in the Board's processing of unfair labor practice complaints would otherwise pose to the NLRA's remedial goals") (citation omitted)); *Fuchs v. Hood Indus., Inc.,* 590 F.2d 395, 397 (1st Cir. 1979) ("[t]he injunctive relief provided for in section 10(j) … is designed to fill the considerable time gap between the filing of a complaint by the Board and issuance of its final decision, in those cases in which considerable harm may occur in the interim").

[6] *See, e.g., Samoff v. Williamsport Bldg. & Constr. Trades Council,* 451 F.2d 272, 274 (3d Cir. 1971) (upholding denial of motion to compel discovery responses because Section 10(*l*) proceedings "'are an attempt … to provide an expeditious remedy'") (citation omitted); *United States v. Electro-Voice, Inc.,* 879 F. Supp. 919, 923 (N.D. Ind. 1995) (limiting discovery in Section 10(j) case "to avoid unnecessary delay in this action's resolution").

standards for the appropriate Circuit.][7] This Court should limit discovery to information relevant only to whether the requested relief is "just and proper."

Thus, the Court does not have jurisdiction to resolve the underlying merits of the dispute, that is, whether the Respondent has in fact committed the alleged unfair labor practices. That function is reserved exclusively for the Board under Section 10(a) of the Act, 29 U.S.C. § 160(a), subject to limited appellate court review under Section 10(e) or (f) of the Act, 29 U.S.C. §§ 160(e) or (f).[8] Instead, because Petitioner's requested injunctive relief is ancillary in nature and lasts only during the time the administrative case is pending before the Board,[9] the district court's inquiry is limited to a determination of whether "contested factual issues could ultimately be resolved by the Board in favor of the [Petitioner]."[10] It is also not the district court's function to weigh conflicting evidence

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[7] *See, e.g., Ahearn v. Jackson Hospital Corp.,* 351 F.3d 226, 234-36 (6th Cir. 2003); *Sharp v. WEBCO Indus., Inc.,* 225 F.3d 1130, 1133-34 (10th Cir. 2000); *Hirsch v. Dorsey Trailers, Inc.,* 147 F. 3d 243, 247 (3d Cir. 1998); 1984); *Arlook v. S. Lichtenberg & Co.,* 952 F.2d 367, 371 (11th Cir. 1992); *Boire v. Pilot Freight Carriers, Inc.,* 515 F.2d 1185, 1188-89 (5th Cir. 1975), *cert. denied,* 426 U.S. 934 (1976) **[*Note: Refer to Appendix D of this manual, Model Section 10(j) Standards by Circuit, to determine how best to describe and provide authority for the applicable legal standards for each case.]**

[8] *E.g., Schaub v. West Michigan Plumbing & Heating, Inc.,* 250 F.3d 962, 969 (6th Cir. 2001) (Section 10(j) case); *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1567 (7th Cir. 1996), *cert. denied,* 519 U.S. 1055 (1997) (Section 10(j) case); *Kobell v. Suburban Lines, Inc.,* 731 F.2d 1076, 1083-84 (3d Cir. 1984) (Section 10(j) case); *Solien v. United Steelworkers of America,* 593 F.2d 82, 86-87 (8th Cir.) (Section 10(*l*) case), *cert. denied,* 444 U.S. 828 (1979); *Kaynard v. Independent Routemen's Ass'n,* 479 F.2d 1070, 1072 (2d Cir. 1973) (Section l0(*l*) case); *Boire v. Teamsters,* 479 F.2d at 792.

[9] *E.g., Sears, Roebuck & Co. v. Carpet Layers,* 397 U.S. 655, 658-659 (1970) (Section 10(*l*) case); *Barbour v. Central Cartage, Inc.,* 583 F.2d 335, 337 (7th Cir. 1978) (Section 10(j) case); *Johansen v. Queen Mary Restaurant Corp.,* 522 F.2d 6, 7 (9th Cir. 1975) (Section 10(j) case).

[10] *Squillacote v. Graphic Arts Int'l Union,* 540 F.2d 853, 860 (7th Cir. 1976) (Section 10(*l*) case).

or resolve credibility disputes.[11] Accordingly, extensive discovery is not required and would only create conflicts in the evidence or raise credibility issues that are for the Board, rather than the court, to resolve.[12]

With respect to the issue of reasonable cause, **[likelihood of success on the merits]**, **[Add the following text if the 10(j) case is tried on the basis of affidavits and other documents in investigatory file:** Petitioner will produce the affidavits and other documentary evidence that will be used in the administrative proceeding to establish the alleged unfair labor practices.**] OR [Add the following text if the 10(j) case is tried on the ALJ record:** Since the administrative record has closed in this case, the Respondent has access to all of the evidence the Petitioner relied on in the administrative proceeding to establish the underlying unfair labor practices.**]** Thus, no other evidence could be relevant to the first issue before this Court, which asks whether there is reasonable cause

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[11] *E.g., Scott v. Stephen Dunn & Assocs.*, 241 F.3d 652, 662 (9th Cir. 2001) (Section 10(j) case) (disputed facts do not prevent issuance of Section 10(j) relief, so long as petitioner presented "some evidence" in support); *NLRB v. Electro-Voice, Inc.*, 83 F.3d at 1568 (court does not apply preponderance of the evidence test and instead looks to whether petitioner "has 'some chance' of succeeding on the merits"); *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987) (Section 10(j) case) ("the district court and this court of appeal are not supposed to resolve conflicts in the evidence"); *Dawidoff v. Minneapolis Bldg. & Constr. Trades Council*, 550 F.2d 407, 411 (8th Cir. 1977) (Section 10(*l*)) (judging the credibility of witnesses is within "the province" of the Board "which properly acts as the primary fact-finder"); *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1150 n.2 (D. Mass. 1983) (Section 10(j)) ("the court cannot and should not decide questions of credibility"), *aff'd per curiam*, 725 F.2d 664 (1st Cir. 1983).

[12] *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 546 (9th Cir. 1969) (Section 10(*l*) case); *Dunbar v. Landis Plastics, Inc.*, 977 F. Supp. 169, 176, n.8 (N.D.N.Y. 1997) (Section 10(j) case), reconsideration denied, 996 F. Supp. 174, 177-179 (N.D.N.Y. 1998), remanded on other grounds, 152 F.3d 917 (2nd Cir. 1998) (unpublished table decision); *United States v. Electro-Voice, Inc.*, 879 F. Supp. at 923; *Kobell v. Reid Plastics, Inc.*, 136 F.R.D. 575, 579 (W.D. Pa. 1991) (Section 10(j) case); *D'Amico v. Cox Creek Refining Co.*, 126 F.R.D. 501, 505 (D. Md. 1989) (decision of U.S. magistrate) (Section 10(j) case).

to believe that the Act has been violated **[there is a likelihood of success on the merits before the Board]**.

Therefore, the scope of the Respondent's discovery request in this injunction proceeding should be restricted to evidence relating to the second issue before this Court, namely, whether injunctive relief is "just and proper."

III. THIS COURT SHOULD GRANT A PROTECTIVE ORDER TO SPECIFICALLY PRECLUDE DISCOVERY OF IRRELEVANT AND PRIVILEGED INFORMATION.

Many of Respondent's discovery requests seek information that is privileged or not relevant to the limited issues before the district court and therefore not subject to discovery under Fed. R. Civ. P. 26(b)(1).[13]

A. Witness Affidavits Are Attorney Work Product and Also Subject to the Informer's Privilege.

Respondent requests copies of all witness affidavits on which Petitioner relied in filing this action **[cite relevant Respondent requests]**. Witness affidavits drafted by Board agents during the administrative investigation and in preparation for this injunction proceeding are protected by the attorney work product doctrine and the informer's privilege.

The work product doctrine generally excludes from discovery written materials prepared by an attorney in anticipation of litigation, except on a particularized showing of need. [14] This rule applies to U.S. Government attorneys,[15] as well as their non-attorney

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[13] **[If the Court permits discovery of arguably privileged documents, the Region should consult with ILB about the preparation of a privilege log.]**

[14] *See* Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 509-512 (1947) (statements by surviving sailors to company lawyer in anticipation of litigation by families of deceased sailors were work product because they reflected attorney's questions and concerns, and necessarily revealed thought processes, theories, and

agents.[16] The work product doctrine reflects the strong public policy against invading the privacy attached to an attorney's preparation of a case, which is so essential to an orderly working of the American legal system.[17]

Here, although the affidavits contain factual material, they necessarily reveal the Board agents' thought processes, legal theories, and strategies. Moreover, Respondent cannot demonstrate the extraordinary and particularized need necessary to overcome the attorney work product privilege.

[The following paragraph should be included *only* when replying to the Respondent's reliance on the cases cited below: Petitioner recognizes that courts have held in some older Section 10(j), Section 10(*l*), and NLRB contempt cases, that affidavits of Board witnesses who would be testifying in the hearing must be produced in discovery to a respondent. *See, e.g., NLRB v. Schill Steel Products*, 408 F.2d 803, 806 (5th Cir. 1969) (civil contempt); *Fusco v. Richard W. Kaase Baking Co.*, 205 F. Supp. at 463-464 (Section 10(j) case). However, in those cases the Board did not assert an attorney work-product privilege, but had argued either that the release of the affidavits could lead to reprisals against witnesses (not a strong argument in view of the fact that these witnesses would be testifying anyway) or the affidavits were within the "government privilege,"

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strategies); *Upjohn Co. v. United States*, 449 U.S. 383, 399-402 (1981) (attorney's notes and memoranda of witnesses' oral statements are protected work product).

[15] *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) ("the case law clearly makes the attorney's work-product rule … applicable to Government attorneys in litigation").

[16] *See United States v. Nobles*, 422 U.S. 225, 238-239 & n.13 (1975) (attorney work-product privilege also applies to materials prepared by non-attorneys who act as agents for attorneys).

[17] *Hickman v. Taylor*, 329 U.S. at 510-12.

which excludes from discovery matters contrary to public policy, internal security, or of a confidential nature. Moreover, these cases were all decided before the Supreme Court concluded in 1975 that the *Hickman v. Taylor* work product doctrine applied to U.S. Government attorneys. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154.**]**

In addition, the affidavits from individuals whose identities will not be revealed in this proceeding are also protected by the government informer's privilege.[18] The informer's privilege permits the government to withhold from discovery the identity of persons who furnish information regarding violations of the law to those officials who are charged with enforcement.[19] The privilege may be invoked in civil cases,[20] including civil actions involving the Board.[21] This privilege furthers the Board's long-standing

[18] While most courts refer to the privilege as the "informer's privilege," this privilege resides with the Government and not the individual informer. *See Roviaro v. United States*, 353 U.S. 53, 59 (1957).

[19] *Id.*

[20] *E.g., Dole v. Electrical Workers Local 1942*, 870 F.2d 368, 372 (7th Cir. 1989) (LMRDA action); *In re United States*, 565 F.2d 19, 22 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).

[21] *See NLRB v. McAdoo*, 165 LRRM 2373, 2000 WL 1466091 (9th Cir. 2000) (decision of Appellate Commissioner) (copy attached) (denying motion to compel production in contempt proceeding of affidavits taken during unfair labor practice investigation); *NLRB v. Laborers Local 1140*, 78 LRRM 2635, 2637, 1971 WL 10972 (8th Cir. 1971) (copy attached) (same); *Male v. San Francisco-Oakland Mailers Union No. 18*, 92 LRRM 3647, 3648, 1976 WL 1639 (N.D. Cal. 1976) (copy attached) (granting motion for protective order prohibiting production of statements and evidence obtained during unfair labor practice investigation); *NLRB v. Truck Drivers Local 282*, 70 LRRM 2793, 1969 WL 11128 (2d Cir. 1969) (copy attached) (excepting informants' affidavits from order compelling production in contempt proceeding).

policy to safeguard access to its processes and to protect those persons who assist Board investigations from threats of reprisal.[22]

The informer's privilege is a qualified privilege that must be balanced in each case with fundamental requirements of fairness.[23] Specifically, the public interest in protecting the flow of information to enforcement authorities is weighed against a party's right to prepare its case.[24] Where the party seeking disclosure fails to make a sufficient showing of necessity, the court properly denies disclosure.[25] There must be "a reasonable probability that the evidence would change the outcome."[26] The party seeking discovery must demonstrate that its requests are more than a mere "fishing expedition" and not based on mere speculation that the information could be useful to Respondent.[27] The

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[22] *See NLRB v. Scrivener,* 405 U.S. 117, 125 (1972) (finding that discharge of employee for giving affidavit to Board violates Section 8(a)(4) of NLRA, 29 U.S.C. §158(a)(4)); *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 239-241 (1978) (ruling that prehearing disclosure of witness statements fell within FOIA exemption because of threat of witness intimidation).

[23] *Roviaro v. United States,* 353 U.S. at 60-61.

[24] *NLRB v. Construction General Laborers Union 1140,* 78 LRRM 2635, ___, 1971 WL 10971 (8th Cir. 1971) (special master) (copy attached).

[25] *See e.g., Elnashar v. Speedway SuperAmerica, LLC,* 484 F.3d 1046, 1052-53 (8th Cir. 2007) (upholding denial of motion to compel disclosure of FBI informant's identity to plaintiff in employment discrimination case); *Dole v. Electrical Workers Local 1942,* 870 F.2d at 372 (upholding DOL's refusal to identify union members who assisted investigation under of union election irregularities); *NLRB v. McAdoo,* 165 LRRM 2373, 2000 WL 1466091; *Hodgson v. Charles Martin Inspectors of Petroleum,* 459 F.2d 303, 305-07 (5th Cir. 1972) (ruling that DOL Secretary was entitled to withhold statements obtained in wage and hour investigation).

[26] *Elnashar v. Speedway SuperAmerica, LLC,* 484 F.3d at 1053.

[27] *See Dole v. Electrical Workers Local 1942,* 870 F.2d at 373, and cases cited therein. *See also United States v. Martinez,* 922 F.2d 914, 921 (1st Cir. 1991) ("the privilege need only give way when disclosure of the informant's identity would be vital to a fair trial").

privilege is less likely to yield in a civil case because the informant's identity is usually not essential to the defense.[28]

In this case, Petitioner does not intend to call as witnesses some of the individuals who provided investigatory affidavits or to rely upon those affidavits as evidence supporting the petition. Because Petitioner is not using the evidence produced by these unknown informers, fairness concerns are not implicated. Also, the Petitioner has not waived the informer's privilege by identifying these individuals. Moreover, Respondent cannot make the requisite showing of necessity. **[Add following text if appropriate: Finally, Respondent's pattern of coercion and discrimination against union supporters raises the specter of affiant coercion if their identities were revealed. *NLRB v. McAdoo,* 165 LRRM at 2373.]** Thus, Respondent's requests for documents that reveal the identity of Board informers should be denied.

B. Internal Agency Memoranda, Correspondence, and Notes Are Protected Work Product and Subject to the Deliberative Process and Attorney-Client Privileges.

Respondent requests copies of documents that include internal agency memoranda, correspondence, and notes. **[cite relevant Respondent requests]**. However, this Court should issue an order protecting such documents from disclosure on the grounds that they are attorney work product and subject to the deliberative process and attorney-client privileges.[29]

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[28] *United States v. One 1986 Chevrolet Van,* 927 F.2d 39, 43-44 (1st Cir. 1991).

[29] *See United States v. Electro-Voice, Inc.,* 879 F. Supp. at 924*; D'Amico v. Cox Creek Refining,* 126 F.R.D. at 505-506; *McLeod v. General Electric,* 257 F. Supp. 690, 702 (S.D.N.Y. 1966) (Section 10(j) case), reversed on other grounds, 366 F.2d 847 (2d Cir. 1966), stay granted, 87 S. Ct. 5 (l966) (Harlan, J.), vacated and remanded, 385 U.S. 533 (1967).

APPENDIX N

As a preliminary matter, to the extent that Respondent seeks information relating to the scope of the Region's investigation, the Agency's injunction program, or other Section 10(j) **[Section 10(*l*)]** cases, such information simply is not relevant to the issues before this Court.[30] Indeed, the courts have denied attempts by respondents to question either the Board's motives in initiating suit or the adequacy of the Board's investigation or consideration process.[31]

Respondent's requests for internal Agency documents are also irrelevant to the extent that they involve allegations of malicious or selective prosecution on the part of the Regional Office, the General Counsel, or the Board itself **[cite respondent's requests]**. Agency personnel, as officers of the United States, are presumed to act in good faith in the absence of clear evidence to the contrary.[32] Indeed, to support a

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[30] *See, e.g., Building & Constr. Trades Council v. Alpert*, 302 F.2d 594, 595-596 (1st Cir. 1962) ("the scope, conduct or extent of the preliminary investigation" are not material in a Section 10(l) case), *quoting Madden v. International Hod Carriers*, 277 F.2d 688, 693 (7th Cir.), *cert. denied*, 364 U.S. 863 (1960); *United States v. Electro-Voice*, 879 F. Supp. at 923 ("the scope and adequacy of the investigation is not a proper issue in this Section 10(j) proceeding"); *Kinney v. Chicago Tribune Co.*, 1989 WL 91844 * 1 , * 4 (N.D. Ill. 1989) (same). *Fusco v. Richard W. Kaase Baking Co.*, 205 F. Supp. 459, 464 (N.D. Ohio 1962) (documents concerning other Section 10(j) proceedings during Regional Director's term "are clearly not relevant").

[31] *See D'Amico v. United States Serv. Indus., Inc.*, 867 F. Supp. at 1085 n.7 ("this case does not provide an appropriate forum for Respondent to question the Board's exercise of its discretion [regarding the filing of 10(j) actions]. The only issue that can be decided by this Court is whether the Board is entitled to Section 10(j) relief in this case."); *McLeod v. General Electric Co.*, 257 F. Supp. at 702 ("it could not comport with the respect owed to the … administrative process … to allow a trial of the regional director's performance of his investigative duties").

[32] *See, e.g., FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980) (upholding enforcement of FTC subpoenas because "agencies are entitled to presumption of administrative regularity and good faith"); *Beverly Enterprises, Inc. v. Herman*, 130 F. Supp.2d 1, 8 (D.D.C. 2000) (refusing to expand discovery because agency is entitled to "presumption of administrative regularity and good faith that must be overcome with evidence").

defense of discriminatory or selective prosecution, a defendant bears a "heavy burden" of proving the prosecutor has acted upon impermissible considerations such as race, sex, religion, or the desire to prevent the exercise of constitutional rights.[33]

Even if the requested internal Agency memoranda contain relevant information, however, such documents are also privileged from disclosure. First, most of the requested internal documents were prepared by Board attorneys and agents in anticipation of litigation, reveal legal theories and litigation strategies, and therefore constitute attorney work product. **[cite relevant Respondent requests]**. Thus, the courts consistently have prohibited discovery of the Region's investigative notes, internal memoranda, and reports under the work product doctrine.[34] Moreover, memoranda prepared by Board agents based on oral statements of witnesses are protected by the work product rule and are similarly discoverable only under the narrow circumstances outlined in Fed. R. Civ. P. 26(b)(3).[35]

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[33] *See St. German of Alaska Eastern Orthodox Catholic Church v. United States,* 840 F.2d 1087, 1095 (2d Cir. 1988) (requiring prima facie showing that agency singled plaintiff out for invidious considerations such as race or religion); *Beverly Enterprises, Inc. v. Herman,* 130 F. Supp.2d at 8 (finding that defendant did not make the necessary showing of "intentional and purposeful discrimination" to overcome presumption of agency's good faith). *Cf. United States v. Armstrong,* 517 U.S. 456, 465 (1996) (under federal rules for discovery in criminal cases, discovery of government documents regarding claim of selective prosecution not proper unless defendant presents "clear evidence" that the prosecutor acted in violation of the equal protection clause, including evidence that similarly-situated persons were not prosecuted).

[34] *See, e.g., United States v. Electro-Voice, Inc.,* 879 F. Supp. at 923-24; *D'Amico v. Cox Creek Refining Co.,* 126 F.R.D. at 505-06.

[35] *Upjohn v. United States,* 449 U.S. at 301-02. *See also NLRB v. Sears, Roebuck & Co.,* 421 U.S. at 154, 159-160 (Advice and Appeals memoranda that instruct Regions to issue complaint not disclosable under FOIA); *Kent Corp. v. NLRB,* 530 F.2d 612, 623-624 (5th Cir.) (final investigative reports prepared by Board agents not subject to FOIA disclosure), *cert. denied,* 429 U.S. 920 (1976).

Second, to the extent that the requested documents deal with the internal recommendations, advisory opinions, and deliberations of Agency officials, attorneys, and agents, they are also protected by the deliberative process privilege.[36] **[cite relevant Respondent's requests]** "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the government."[37] Absent a showing of extraordinary need by Respondent, the requested internal Agency documents are not subject to discovery.[38]

Finally, certain of Respondent's requests seek information protected by the attorney-client privilege. **[cite relevant Respondent's requests]** Because Section 10(j) proceedings must be authorized by the members of the National Labor Relations Board,[39] all communications concerning Section 10(j) matters between the General Counsel's

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[36] *Department of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 3 (2001); *NLRB v. Jackson Hospital Corp.,* 257 F.R.D. 302, 308 (D.D.C. 2009) (contempt proceeding).

[37] *Department of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. at 3 (citations and internal quotation marks omitted).

[38] *See United States v. Electro-Voice, Inc.,* 879 F. Supp. at 923-24 (granting motion to quash subpoena and motion for protective order prohibiting production of internal reports, notes, files, and memoranda)**;** *D'Amico v. Cox Creek Refining,* 126 F.R.D. at 505-506 (same); *McLeod v. General Electric*, 257 F. Supp. at 702 (granting motion to quash subpoena of documents considered by Board in authorizing Section 10(j) proceeding); *Boire v. Pilot Freight Carriers,* 86 LRRM 2462, 2463, 1974 WL 1115, at *1 (M.D. Fla. 1974) (quashing subpoena of Division of Advice and Office of Appeals memoranda and other memoranda indicating General Counsel's legal theory).

[39] See 29 U.S.C. § 160(j); *Gottfried v. Frankel,* 818 F.2d at 492; *Solien v. Merchants Home Delivery Service, Inc.,* 557 F.2d 622, 627 n.2 (8th Cir. l977).

Office, which includes the Regional Offices, and the Board are those of an attorney and its client.[40]

C. The Court Should Quash the Notice of the Regional Director's Deposition Because [He/She] Has No First-Hand Knowledge of the Facts at Issue, the Testimony Sought is Protected by Privilege, and any Discoverable Information [He/She] Has Is Available Elsewhere.[41]

Depositions of high agency officials are disfavored and granted only on a showing of exceptional circumstances.[42] Generally a top government official may only be deposed upon a showing that relevant information is not available through any other source.[43] Respondent cannot meet that burden here.

First, the Regional Director's testimony is not relevant to any issue in this Section 10(j) proceeding. **[He/She]** was not a witness to the events at issue and does not have any first-hand knowledge of any relevant evidence.[44] To the extent that the Respondent

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[40] *United States v. Electro-Voice, Inc.,* 879 F. Supp at 924. *See also Holland Rantos Co.,* 234 NLRB 726, 726 n.3 (1978), *enforced,* 583 F.2d 100, 104 n.8 (3d Cir. 1978).

[41] **[If the Region is filing a Motion for a Protective Order solely to quash a notice of deposition, then the Region should expand the discussion of the work product and deliberative process privileges in this section based upon the material in Sections III A and III B supra.]**

[42] *See, e.g., In re F.D.I.C.*, 58 F.3d 1055, 1060-63 (5th Cir. 1995) (party seeking discovery did not make the "strong showing necessary for a finding of exceptional circumstances" to warrant depositions of FDIC Directors), and cases cited therein; *Kyle Engineering Co. v. Kleppe,* 600 F.2d 226, 231 (9th Cir. 1979) (heads of government agencies, such as the Small Business Administration Administrator, are not normally subject to depositions).

[43] *See Church of Scientology of Boston v. I.R.S.,* 138 F.R.D. 9, 12-13 (D. Mass. 1990) (Director of Exempt Organizations, Technical Division, IRS) and cases cited therein.

[44] *See Barker v. Regal Health & Rehab Center, Inc.,* 632 F. Supp.2d817, 836 (N.D. Ill. 2009) (quashing Regional Director's deposition because he "was not involved in the facts underlying this [Section 10(j)] case"); *Ahearn v. Rescare West Virginia,* 208 F.R.D. 565, 568 (S.D. W.Va. 2002) (quashing deposition of Regional Director who had "no first hand knowledge of relevant evidence" in Section 10(j) case); *Low v. Whitman,* 207 F.R.D. 9,

intends to delve into the conduct and adequacy of the Board's investigation, those matters are beyond the scope of this proceeding.[45]

In addition, examination of the Regional Director's **[or other Agency official]** thought processes regarding the evidence or the theory of violation would implicate the attorney work product doctrine and the deliberative process privilege.[46] A deposition of an Agency representative about the allegations of the petition almost inevitably will involve questions about "the reports and thought processes of the Board's attorneys' and investigators"[47] and what significance the deponent attaches to the various facts.[48]

12-14 (D.D.C. 2002) (preventing deposition of EPA deputy chief of staff who had no personal knowledge relevant to employment discrimination claim).

[45] *United States v. Electro-Voice, Inc.,* 879 F. Supp. at 923 (precluding depositions of regional director and field examiner in Section 10(j) case since it "would be of little or no relevance in light of the limited scope of this court's inquiry"); *D'Amico v. Cox Creek Refining,* 126 F.R.D. at 505 (same); *Boire v. Pilot Freight Carriers,* 86 LRRM at 2463, 1974 WL 1115, at *1 (same). *See also NLRB v. Whitter Mills Co.,* 123 F.2d 725, 728 (5th Cir. 1941) (opinion of regional director is irrelevant to issues before court in contempt proceeding).

[46] *NLRB v. Building & Constr. Trades Council of Philadelphia,* 131 LRRM 2022, 2023-24, 1989 WL 98643, at *1-2 (3d Cir. 1989) (decision of Special Master) (copy attached) ("highly improbable" that deposition of regional director could "exclude work product or deliberative processes"); *Ahearn v. Rescare West Virginia,* 208 F.R.D. at 567-68 (information within regional director's knowledge "'is so intertwined with the litigation process of the Board as to be privileged'") (citation omitted); *United States v. Electro-Voice, Inc.,* 879 F. Supp. at 924 (deposition of regional director and field examiner would violate the work product and deliberative process privileges); *D'Amico v. Cox Creek Refining Co.,* 126 F.R.D. at 506 ("difficult to imagine" how deposition of field examiner investigator "could avoid intruding into the deliberative processes or protected work product of the agency").

[47] *NLRB v. Building & Constr. Trades Council of Philadelphia,* 131 LRRM 2022, 2023-24, 1989 WL 98643, at *1.

[48] *Ahearn v. Rescare West Virginia,* 208 F.R.D. at 567-68 ("only reasonable area of inquiry" in deposition of regional director would involve his "mental impressions and opinions in weighing the evidence"). *See also Simplex Time Recorder Co. v. Secretary of Labor,* 766 F.2d 575, 586-87 (D.C. Cir. 1985) (upholding ALJ's refusal to allow

Moreover, if the Respondent truly desires to determine the factual basis of the Board's petition, it has other means of obtaining that information. The Board has furnished the Respondent with affidavits and other documents proffered in support of the petition. **[Respondent also has all of the evidence the Board will consider in determining the merits of the unfair labor practice complaint contained in the transcript and exhibits of the administrative hearing in which Respondent fully participated.]** In these circumstances, the Respondent has more than sufficient alternative means to discover the factual basis of the petition's allegations without deposing the Regional Director or other Agency personnel.[49]

D. Statistical Information About the Agency's Injunction Program Is Not Relevant to the Issues Before this Court.

The statistical information Respondent requests **[cite to relevant requests]** is simply not relevant to the question of whether Section 10(j) relief is warranted in this proceeding. Thus, Respondent has requested information concerning the number and types of unfair labor practice complaints issued by the Regional Office and the Agency in a given period or the number and types of Section 10(j) injunction proceedings initiated by the Board. Even under the liberal standard of relevance applicable to discovery, the information sought must be "reasonably calculated to lead to the discovery of admissible evidence."[50] Such statistics, at most, could bear only on the manner the Board exercises its Section 10(j) authority and not whether Section 10(j) relief is just and proper in this

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examination of DOL officials because "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions").

[49] *See Samoff v. Williamsport Bldg. & Constr. Trades Council*, 451 F.2d at 274; *Ahearn v. Rescare West Virginia*, 208 F.R.D. at 568.

[50] Fed.R.Civ.P. 26(b)(1).

case.[51] As discussed above, the courts have denied attempts by respondents to question either the Board's motives in initiating suit[52] or the adequacy of the Board's investigation or consideration process.[53]

IV. PETITIONER WILL WAIVE CLAIMS OF PRIVILEGE WITH RESPECT TOCERTAIN DOCUMENTARY EVIDENCE AND PRODUCT THOSEDOCUMENTS SUBJECT TO COURT SUPERVISION.

In order to facilitate the discovery process and thereby expedite the hearing before the Court on this Petition, the Board is prepared to waive its claim of attorney work product and produce the affidavits of those witnesses whom it intends to call to testify in this proceeding.[54] In addition, the Board will produce the documentary evidence in the Regional Office's investigatory file in this matter, other than internal Agency communications, notes, or memoranda.[55] In these circumstances, and noting particularly the statutory mandate to expedite this proceeding under 28 U.S.C. § 1657(a) and Section

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[51] Find cases? [cases previously cited not relevant]

[52] *See D'Amico v. United States Serv. Indus., Inc.*, 867 F. Supp. at 1085 n.7 ("this case does not provide an appropriate forum for Respondent to question the Board's exercise of its discretion [regarding the filing of 10(j) actions]. The only issue that can be decided by this Court is whether the Board is entitled to Section 10(j) relief in this case").

[53] *See Building & Constr. Trades Council v. Alpert*, 302 F.2d at 595-596 ("the scope, conduct or extent of the preliminary investigation" are not material in a Section 10(l) case) (citation omitted); *United States v. Electro-Voice*, 879 F. Supp. at 923 ("the scope and adequacy of the investigation is not a proper issue in this Section 10(j) proceeding"); *Kinney v. Chicago Tribune Co.*, 1989 WL 91844 at * 4 (same). *Fusco v. Richard W. Kaiser Baking Co.*, 205 F. Supp. at 464 (documents concerning other Section 10(j) proceedings during Regional Director's term "are clearly not relevant").

[54] **[*See p. 2, n. 1 of the Model Motion for Protective Order as to the suggested scope of the waiver of the Region's attorney work product privilege.]**

[55] **[See paragraph 5 of the Board's Motion for Protective Order to Limit Discovery in this proceeding.]**

10(j) **[or 10(*l*)],** a protective order to limit discovery under Fed. R. Civ. P. 26(c) is warranted.

[** Add this section only if appropriate. For example use this section if a CA case involves employer threats or discrimination against employees or if a CB case involves violence or improper internal union discipline.]**

However, the Petition reveals serious violations by the Respondent that directly and flagrantly interfere with the statutory rights of employees under the Act **[give examples of violations]**. Petitioner's witnesses, who are, will be, or seek to be employees of **[represented by or members of]** Respondent could be subject to further threats and intimidation, a likelihood long recognized by the courts in labor disputes litigation.[56] In these circumstances, Petitioner requests the Court to grant as part of a protective order under Fed. R. Civ. P. 26(c), the following provisions to safeguard the statutory rights of the affected employee **[member]** witnesses: [57]

(a) Respondent's counsel should be prohibited from disclosing or revealing the contents of any affidavits to Respondent, its officers, supervisors or agents, except to the limited extent necessary to allow counsel for Respondent to discuss the allegations set forth in particular affidavits with concerned Respondent officials;

(b) Respondent, its officers, supervisors, and agents should be prohibited from directly contacting any of the affiants concerning their testimony except via counsel for Petitioner;

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[56] *See NLRB v. Robbins Tire and Rubber Co.,* 437 U.S. at 239-241, and cases cited therein.

[57] Other district courts have imposed some or all of these conditions in similar circumstances. *See United States v. Electro-Voice, Inc.,* 879 F. Supp. at 925; *Kobell v. Reid Plastics, Inc.,* 136 F.R.D. at 580; *D'Amico v. Cox Creek Refining Co.,* 126 F.R.D. at 507.

(c) Counsel for the Petitioner should be permitted upon adequate notice to be present at all times during any Respondent interviews with any of the affiants; and

(d) Respondent, its officers, supervisors, and agents should be prohibited from threatening, disciplining, discharging, or otherwise affecting in any negative manner the employment status **[or union membership]** of any of the affiants without first notifying Petitioner and securing the prior permission of the Court, if said affiants are, become, or seek to become employees **[or members]** of Respondent.

V. CONCLUSION

Petitioner has demonstrated "good cause," warranting the issuance of a protective order under Fed. R. Civ. P. 26(c)(1) to both limit and control discovery as follows:

(a) require that the discovery process be expedited;

(b) strike **[insert references to specific discovery requests]** on the grounds of relevance;

(c) strike **[insert references to specific discovery requests]** on the grounds of privilege;

(d) quash the notice of deposition of the Regional Director **[or other Agency officials]**; **and,**

(e) control the manner in which Respondent and its counsel communicate or deal with any affiant whose affidavit is produced for discovery and is, becomes, or seeks to become an employee [or is represented by or seeks to become a member] of Respondent.]

Accordingly, Petitioner respectfully requests that the Court grant **his/her** Motion for a Protective Order pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure.

APPENDIX N

A copy of a proposed order limiting discovery is attached. If the Court considers it advisable, Petitioner is prepared to offer oral argument on the issues raised by this Motion.

Finally, Petitioner requests that the hearing on its Section 10(j) Petition be held promptly upon completion of the discovery process.

h:/advice/injlit/10jManual/Model26(c)mem2009.dlw.doc
August 2009

APPENDIX N

APPENDIX N-3

MODEL ORDER LIMITING DISCOVERY PURSUANT TO FED. R. CIV. P. 26(C)(1)

Petitioner _____, Regional Director of Region ____ of the National Labor Relations Board, having filed a Motion for Protective Order to limit Discovery in this cause of action, filed pursuant to 29 U.S.C. Section 160(j) **[or (l)]**, and the court having duly considered the Motion and the response of the Respondent, ___, the Court hereby grants said Motion for good cause shown pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure.

IT IS ORDERED that Petitioner's Motion is GRANTED and that Respondent's request for discovery shall proceed only as follows:

1. All discovery in this proceeding should proceed as expeditiously as possible;

2. Paragraphs ___ of the Respondent's Notice of Deposition are struck and no discovery will be permitted with respect thereto;

3. Respondent's requested deposition of Regional Director **[request for interrogatories, etc.]** is denied;

4. Petitioner will produce for discovery to Respondent copies of all documentary evidence and exhibits contained in the Regional Office's investigatory file in NLRB Case ____, other than internal Regional Office, Office of the General Counsel or Board communications or memoranda, and all witness affidavits in the Regional Office's possession **[of witnesses which Petitioner intends to call at the hearing before the Court on the Petition for Temporary Injunction Relief]**; and

APPENDIX N

[*/5. The Petitioner's production for discovery to Respondent of the affidavits of witnesses are subject to the following ORDERS of the Court:

a) Respondent's counsel and its agents are prohibited from disclosing or revealing the contents of any affidavits to Respondent, its officers, supervisors or agents, except to the limited extent necessary to allow counsel for Respondent to discuss the allegations set forth in particular affidavits with concerned Respondent officials;

b) Respondent, its officers, supervisors and agents are prohibited from directly contacting any of the affiants concerning their testimony except via counsel for Petitioner;

c) Counsel for Petitioner shall be permitted upon adequate notice to be present at all times during any Respondent interviews with any of the affiants; and

d) Respondent, its officers, supervisors and agents are prohibited from threatening, disciplining, discharging or otherwise affecting in any negative manner the employment status **[or union membership]** of any of the affiants without first notifying Petitioner and securing the prior permission of the Court, if said affiants are, become or seek to become employees **[or members]** of Respondent.**]**

Ordered this ____ day of ____, (year)

_____
United States District Court

APPENDIX N

APPENDIX N-4

SAMPLE MOTION TO QUASH NOTICE OF DEPOSITION

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RAYMOND D. WILLMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD	)	
Petitioner,	)	Civil No. 01-CV-6079-TC
v.	)	PETITIONER'S MOTION TO QUASH NOTICE OF DEPOSITION
THE GUARD PUBLISHING COMPANY d/b/a THE REGISTER GUARD	)	PURSUANT TO FED. R. CIV. P. 26(c)(1)
Respondent.	)	

Comes now counsel for the Petitioner, Raymond D. Willms, Acting Regional Director for Region 19 of the National Labor Relations Board (herein Board), and pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure, moves the Court for An Order Quashing a Notice of Deposition of Acting Regional Director Raymond D. Willms by the Respondent, The Guard Publishing Company, d/b/a The Register Guard. In support of this Motion, counsel for Petitioner states the following:

1. On February 20, 2001, the Petitioner filed a Petition for Temporary Injunctive Relief pursuant to Section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(j) (herein the Act). The Petition is based upon an unfair labor

practice complaint against the Respondent that issued in NLRB Cases 36-CA-8721, -8759, pursuant to Section 10(b) of the Act, 29 U.S.C. § 160(b). The Court has scheduled a hearing for April 11, 2001, at which time Respondent is to show cause why, while the unfair labor practice case is pending before the Board, Respondent should not be temporarily enjoined or restrained in the manner prayed for in said Petition.

2. The limited legal issue before the Court in this proceeding is whether **[in "reasonable cause" and "just and proper" circuits add:** there is reasonable cause to believe the Act has been violated, and whether **]** interim injunctive relief is "just and proper" pending final Board adjudication of the question of whether Respondent has violated and is violating the Act, 29 U.S.C. § 151, et seq. **[Insert test in applicable circuit:]** In the Ninth Circuit, district courts determine whether Section 10(j) relief is "just and proper" under traditional equitable criteria. See *Miller v. California Pacific Medical Center,* 19 F. 3d 449, 456 (9th Cir. 1994)(en banc). This proceeding is to be given expedited consideration by the Court pursuant to 28 U.S.C. § 1657(a), as well as the Congressional purpose underlying Section 10(j) of the Act.

3. On March 6, 2001, Respondent served counsel for Petitioner with a Notice of Deposition of the Acting Regional Director, Raymond D. Willms, a copy of which is attached hereto as Petitioner's Exhibit A.

4. The Notice of Deposition issued to Petitioner described above in Paragraph 3 requests testimony that deals with the mental processes and deliberations of, and communications among, the Petitioner, the Regional Office staff of Region 19 of the Board, the Board's Acting General Counsel, 29 U.S.C. § 153(d), and the Board itself, 29

U.S.C. § 153(a), concerning the decision to institute temporary injunction proceedings pursuant to Section 10(j) of the Act.

5. Petitioner submits that all testimony requested by Respondent in its Notice of Deposition described above in Paragraph 3 concerns matters that are not subject to discovery under Rule 26(b) of the Federal Rules of Civil Procedure, because (1) the testimony concerns matters not relevant to the limited issue of **[whether there is "reasonable cause" and]** whether Section 10(j) relief is "just and proper" in this case and (2) the testimony is protected by the deliberative process privilege which has not been overcome by any showing of substantial need on the part of the Respondent.

6. Petitioner further submits that the requested deposition of the Acting Regional Director would serve no useful purpose under the discovery provisions of the Federal Rules of Civil Procedure, as **[insert if applicable:** the record of the Administrative Law Judge hearing, and**]** copies of any affidavits of witnesses Petitioner intends to call at the District Court's April 11, 2001 hearing, will adequately prepare Respondent to defend against the allegations of the Petition under the statutory scheme of Section 10(j).

Accordingly, consistent with Rule 26(b) of the Federal Rules of Civil Procedure, and pursuant to Rule 26(c)(1) thereof, Petitioner respectfully moves the Court to quash Respondent's Notice of Deposition of Acting Regional Director Raymond D. Willms and order that no further discovery should be permitted thereto.

Finally, if the Court deems it advisable, Petitioner is prepared to present oral argument on the issues raised by this Motion.

DATED at Seattle, Washington this _____ day of March 2001.

_____
Jo Anne P. Howlett
Attorney for Petitioner

APPENDIX N

APPENDIX N-5

SAMPLE MEMORANDUM IN SUPPORT OF MOTION TO QUASH NOTICE OF DEPOSITION

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RAYMOND D. WILLMS, Acting Regional Director of the Nineteenth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD	)	
Petitioner,	)	Civil No. 01-CV- 6079-TC
v.	)	PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH RESPONDENT'S NOTICE OF DEPOSITION TO PETITIONER RAYMOND D. WILLMS
THE GUARD PUBLISHING COMPANY d/b/a THE REGISTER GUARD	)	
Respondent.	)	

To the Honorable Thomas M. Coffin of the United States District Court for the District of Oregon:

1. Introduction

The instant proceeding before the Court is a statutory, temporary injunction request under 29 U.S.C. § 160(j) initiated by Raymond D. Willms, the Acting Regional Director of Region 19 of the National Labor Relations Board (herein Board), for and on behalf of the Board.

On March 6, 2001, the Respondent, The Guard Publishing Company d/b/a The Register Guard, served on the Board a request for discovery consisting of a Notice of Deposition to Petitioner Raymond D. Willms, attached to Petitioner's Motion as Exhibit A. The parties have made a good faith effort through personal telephone conversation to resolve the instant discovery dispute and have been unable to do so.

2. Summary of Argument

Petitioner concedes that the discovery provisions of the Federal Rules of Civil Procedure apply to the Federal Government. See *U.S. v. Proctor & Gamble*, 356 U.S. 677, 681 (1958). Although the Federal Rules of Civil Procedure contemplate broad discovery and a wide definition of relevancy, Rule 26(b)(1) limits discovery to the production of material that is "reasonably calculated to lead to the discovery of admissible evidence" in the proceeding before the court. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978). District courts may, however, limit discovery upon a showing of good cause. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). Further, a party may not discover material that is subject to a valid privilege, absent a showing of substantial need. See *Baldridge v. Shapiro*, 455 U.S. 345, 360 (1982). It is the Board's position that any testimony from the Acting Regional Director is irrelevant to the issue of whether Section 10(j) injunctive relief is "just and proper" in this case. Such testimony is also protected by the deliberative process privilege and the Respondent has failed to show the substantial need to overcome the privilege. In these circumstances, the Court should grant the Petitioner's Motion to Quash the Respondent's Notice of Deposition.

3. The Respondent's Discovery Request Seeks Disclosure of Information that is Not Relevant to the Issues Properly Before the District Court

[Regions should choose from one of the two following samples for the applicable 10(j) standard in their circuit – either the "reasonable cause" and "just and proper" test, or the traditional equitable criteria. The Region should substitute cases from within their own circuit to support the argument.]

APPENDIX N

[For circuits that apply the "reasonable cause" and "just and proper" test:

The issues before a district court in this type of statutory injunction proceeding, which is merely ancillary to the Board's administrative unfair labor practice proceeding, are whether there is reasonable cause to believe that Respondent has violated the Act, and whether interim injunctive relief is "just and proper" pending final Board adjudication of the underlying unfair labor practice case.

The Sixth Circuit has held that, in determining whether there is "reasonable cause" to believe that the Act has been violated, a district court need not decide the merits of the case. See *Fleischut v. Nixon Detroit Diesel, Inc.,* 859 F.2d 26, 28 (6th Cir. 1988)*; Gottfried v. Samuel Frankel,* 818 F.2d 485, 493 (6th Cir. 1987). Indeed, petitioner's burden in proving "reasonable cause" is "relatively insubstantial." *Levine v. C & W Mining, Inc.,* 610 F.2d 432, 435 (6th Cir. 1979); *Fleischut v. Nixon Detroit Diesel, Inc.,* 859 F.2d at 29; *Kobell v. United Paperworkers International Union, et al.,* 965 F.2d 1401, 1406 (6th Cir. 1992). The district court should not undertake to resolve any conflicts in the evidence or to resolve issues of credibility of witnesses, but should accept petitioner's version of events as long as facts exist which could support the Board's theory of liability. *Fleischut v. Nixon Detroit Diesel, Inc.,* 859 F.2d at 29*; Gottfried v. Samuel Frankel,* 818 F.2d at 493-494; *Kobell v United Paperworkers International Union, et al.,* 965 F.2d at 1407.

In the Sixth Circuit, injunctive relief is "just and proper" under Section 10(j) of the Act where such relief is "necessary to return the parties to status quo pending the Board's processes in order to protect the Board's remedial powers under the NLRA." *Kobell v. United Paperworkers International Union, et al.,* 965 F.2d at 1410, quoting

Gottfried v. Frankel, 818 F.2d at 495. This standard is less stringent than traditional equitable principles and does not require consideration of elements such as irreparable harm. *Fleischut v. Nixon Detroit Diesel, Inc.,* 859 F.2d at 30, fn.3. Interim injunctive relief is warranted whenever the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures rendered meaningless. *Sheeran v. American Commercial Lines, Inc.,* 683 F.2d 970, 979 (6th Cir. 1982), quoting *Angle v. Sacks,* 382 F.2d 655, 660 (10th Cir. 1967). See also *Fleischut v. Nixon Detroit Diesel, Inc.,* 859 F.2d at 30-31.**]**

[For circuits that apply the traditional equitable criteria: The Ninth Circuit has held that, in determining whether injunctive relief is "just and proper" under Section 10(j) of the Act, district courts should apply the traditional equitable criteria that govern requests for injunctive relief. See *Miller v. California Pacific Medical Center,* 19 F. 3d 449, 459 (9th Cir. 1994) (en banc). That is, the court should evaluate (1) the likelihood that the moving party will succeed on the merits of the underlying NLRB administrative complaint; (2) the possibility of irreparable harm to the moving party if interim relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) whether the granting of a preliminary injunction serves the public interest. *Id.,* 19 F.3d at 456.

The Ninth Circuit has held that the Regional Director need not prove the allegations of a 10(j) petition by a preponderance of the evidence as required in an administrative proceeding. Rather, only "a better than negligible chance of success" need be shown. *Scott v. Stephen Dunn & Associates,* 241 F.3d 652, 662 (9th Cir. 2001). At a minimum, the Regional Director must demonstrate a "fair chance of success on the

merits." *Miller v. California Pacific,* 19 F.3d at 460, citing *Arcamuzi v. Continental Air Lines, Inc.,* 189 F.2d 935,937 (9th Cir. 1987); *Stephen Dunn & Associates,* 241 F.3d at 662, 666. In assessing whether the Regional Director has met this burden, a district court must take into account that it lacks jurisdiction over unfair labor practices; and that, ultimately, the Board's determination on the merits will be given considerable deference. *Miller v. California Pacific,* 19 F.3d at 460, and cases there cited. See also *Photo-Sonics, Inc. v. NLRB,* 678 F.2d 121, 123 (9th Cir. 1982). The district court should not resolve credibility conflicts in the evidence. *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1571 (7th Cir. 1996). Accord: *Stephen Dunn & Associates,* 241 F.3d at 662 (conflict in the evidence does not prevent the issuance of 10(j) relief). Rather, the court should focus on whether the Board has produced "some evidence" to support the unfair labor practice allegations. *Miller v. California Pacific,* 19 F.3d at 460; *Stephen Dunn & Associates,* 241 F.3d at 662.

In applying traditional equitable principles to a 10(j) petition, district court must consider the matter through the "prism of the underlying purpose of Section 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." *Stephen Dunn & Associates,* 241 F.3d at 661, quoting *Miller v. California Pacific,* 19 F.3d at 459-460. In evaluating whether irreparable injury to the policies of the Act is threatened, as well as in balancing the hardships, the district court must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Miller v. California Pacific,* 19 F.3d at 460, citing *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987); *Stephen*

Dunn & Associates, 241 F.3d at 667-668, 669.**]** This framework should inform the Court of the relevancy of any purported testimony of the Board's Acting Regional Director for discovery purposes.

First, the deposition of the Acting Regional Director is not relevant to any issue in the 10(j) proceeding. As a Board official, he was not a witness to the events at issue in this case and does not have any first-hand knowledge of any relevant evidence which has not already been made available to Respondent. See, e.g., *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586-587 (D.C. Cir. 1985). The Acting Regional Director is an official of the Board whose participation in the case is merely to act on behalf of the Board. See *Gottfried v. Frankel*, 818 F.2d 485, 491-492 (6th Cir. 1987). The affidavit that the Acting Regional Director filed together with the 10(j) petition merely signified that he had properly executed his official duties on behalf of the Board. In carrying out those official duties, Mr. Willms was simply the recipient of information distilled from the investigation of this case by his agents in the Regional Office of the Board. See *NLRB v. Trades Council*, 131 LRRM 2022, 2024 (3d Cir. 1989, opinion of special master)(copy attached). Thus, the deposition of the Acting Regional Director will not disclose any *evidence* as to whether injunctive relief in this case is "just and proper." It is clear, therefore, that any inquiries pertaining to the **reasonable cause/likelihood of success on the merits** issue are appropriately beyond the scope of questions Respondent could properly address to petitioner. **[Insert the following when case is being heard on the ALJ transcript:** All of the evidence which the Board will consider in determining the merits of the unfair labor practice complaint is contained in the transcript and exhibits

of the administrative hearing in which Respondent fully participated, copies of which Respondent has received and have been admitted into the record in this proceeding.**]**

In view of the total absence of any relevant factual material to be discovered in the testimony of the Acting Regional Director (*Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 352 (1978)), the only information which could be gained by such a deposition would concern which specific facts adduced in the Board's investigation were relied upon, or not relied upon, by the Acting Regional Director in reaching a decision to seek interim injunctive relief. It is inescapable that the deposition would then be seeking to elicit testimony regarding the Acting Regional Director's impressions, opinions and the weighing of evidence that is part of the Board's investigative and deliberative process. Such areas are not relevant to the issues before the Court. See, e.g., *NLRB v. Whittier Mills Co.,* 123 F.2d 725, 728 (5th Cir. 1941)(finding that Regional Director's beliefs are irrelevant to issues before court); *McLeod v. Local 239, Teamsters,* 330 F.2d 108, 112 (2d Cir. 1964)(respondent "should have attempted to prove that reasonable cause [to believe violation occurred] did not exist, rather than seeking to psychoanalyze the regional director"). The courts that have passed on Section 10(j) and 10(l) petitions[1] have expressly declined to examine, and have refused to permit discovery regarding, the processes by which the Board investigates and deliberates concerning the decision to institute preliminary injunction proceedings, because such matters are not relevant to the court's "just and proper" inquiry. See, e.g., *Madden v. International Hod Carriers,* 277 F.2d 688, 693 (7th Cir.), *cert. denied* 364 U.S. 863 (1960)(affirming refusal to require testimony of Board agent regarding the Board's preliminary investigation and the

[1] Section 10(l) of the Act, 29 U.S.C. § 160(l), is a companion provision to Section 10(j) that obligates the Board to seek temporary injunctions in cases involving certain violations of the Act committed by unions, such as secondary boycotts.

decisional process in 10(l) proceeding). Accord: *Building & Construction Trades Council v. Alpert*, 302 F.2d 594, 595-596 (1st Cir. 1962); *U.S. v. Electro-Voice, Inc.*, 879 F.Supp. 919, 923-924 (N.D. Ind. 1995); *D'Amico v. Cox Creek Refining Co.*, 126 F.R.D. 501, 505 (D. Md. 1989); *NLRB v. Trades Council*, 131 LRRM at 2023-24; *McLeod v. General Electric Co.*, 257 F. Supp. 690, 702 (S.D.N.Y. 1966), *rev'd on other grounds* 366 F.2d 847 (2d Cir. 1966), *stay granted* 87 S.Ct. 5 (1966) (J. Harlan), *vacated and remanded* 385 U.S. 533 (1967).

In the instant case, whether injunctive relief is "just and proper" does not turn on what the Acting Regional Director, the Board's General Counsel and/or the Board may have thought or considered either in issuing the Board's administrative complaint or in deciding to seek interim injunctive relief under Section 10(j). Rather, it is the evidence adduced and the legal arguments advanced by the Board that are determinative. See *Madden v International Hod Carriers*, 277 F.2d at 693 (the propriety of a 10(l) injunction is "to be resolved by the evidence adduced by the Board in open court to sustain its petition"; the Board's internal investigation and determinations regarding the petition are "judicially tested" only by the Board's subsequent ability to prove its case in court). The Court will test the propriety of injunctive relief herein by examining the evidence proffered by the Board in support of the petition and analyzing the Acting Regional Director's legal theories as set forth in his pleadings and legal memoranda. It would be improper to transform this proceeding into an inquiry whether the Acting Regional Director properly performed his official duties. See *McLeod v. General Electric Co.*, 257 F. Supp. at 702.

In sum, the material that Respondent seeks through the deposition of the Acting Regional Director is not relevant to any issue properly before the district court. On this basis, permitting the deposition to proceed would be improper.

4. The Information Respondent Seeks Through Discovery is Protected By the Deliberative Process Privilege and Respondent Has Made No Showing of a Substantial Need to Overcome the Privilege

The information Respondent seeks through discovery is also protected by the deliberative process privilege. The deliberative process privilege shields from discovery the internal, predecisional deliberations of government agencies, including their decisions to institute suit. See *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161-1162 (9th Cir. 1984); *U.S. v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993). As a result, the privilege insures the "frank discussion of legal and policy matters ... essential to the decisionmaking process of a government agency." *U.S. v. Farley*, 11 F.3d at 1389. Curtailing the deliberative process privilege seriously interferes with the quality and integrity of the administrative process. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *NLRB v. Botany Worsted Mills, Inc.*, 106 F.2d 263, 267 (3d Cir. 1939) (denying respondent inquiry into Board decision-making process). While the deliberative process privilege is not absolute, the burden is on the party seeking discovery to show a substantial need to overcome the privilege. See *U.S. v. Farley*, 11 F.3d at 1389-90; *FTC v. Warner Communications, Inc.*, 742 F.2d at 1161-62.

Courts have held that the deliberative process privilege precludes questions concerning the factual basis and underlying reasons for the Board's decision to seek injunctive relief under Section 10(j) of the Act. See *U.S. v. Electro-Voice, Inc.*, 879 F. Supp. at 923-924 (employer not permitted to obtain testimony regarding information

contained in reports protected by deliberative process privilege; quashed notice of deposition of NLRB Regional Director). Accord: *D'Amico v. Cox Creek Refining Co.,* 126 F.R.D. at 505 (quashing notice of deposition of Board investigator). See also *NLRB v. Trades Council,* 131 LRRM at 2023-24 (quashing notice of deposition of Regional Director). Since the information sought by Respondent is subject to the deliberative process privilege, Respondent should not be permitted to take the deposition of the Acting Regional Director absent a clear showing of substantial need for the information which outweighs the government's significant interest in not disclosing it. See, e.g., *U.S. v. Electro-Voice, Inc.,* 879 F. Supp. at 923-924.

Accordingly, the testimony of the Acting Regional Director sought by the Respondent would manifestly implicate the deliberative process privilege and the Respondent has made no showing of a substantial need to overcome this privilege. On this basis, the Court should quash the Respondent's Notice of Deposition.

5. Conclusion

For all of the above reasons, Petitioner respectfully requests that Petitioner's Motion to Quash Respondent's Notice of Deposition for the Acting Regional Director, Raymond D. Willms, be granted.

DATED at Seattle, Washington this _____ day of March, 2001.

_____
Jo Anne P. Howlett
Attorney for Petitioner

APPENDIX O

September 5, 2002

The Honorable Frederick Block
United States District Court
For the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ALVIN BLYER V. PRATT TOWERS, INC.
Case No. CV-00-2499

Dear Judge Block:

Enclosed please find a copy of the Decision and Recommended Order issued by Administrative Law Judge Jesse Kleiman concerning the above-captioned case. In his Decision and Recommended Order, Judge Kleiman finds all of the violations of the National Labor Relations Act alleged by Counsel for the General Counsel (Petitioner herein) in the Consolidated Complaint in Case Nos. 29-CA-22657, 29-CA-22660 and 29-CA-22666[1]. Specifically, Judge Kleiman found, *inter alia*, that Respondent violated Section 8(a)(3) of the National Labor Relations Act by unlawfully refusing to reinstate six striking employees to their former positions of employment upon their unconditional offer to return to work. Respondent has been ordered to reinstate the six strikers with full backpay and interest. In addition, the Judge found that Respondent "engaged in a predetermined and planned course of conduct designed to undermine the status of the Union and to convince employees that it would be futile to continue to support the Union…" in violation of Section 8(a)(5) of the Act. Respondent has been ordered, upon request, to bargain in good faith with the Union over the terms and conditions of employment of its employees.

Judge Kleiman's Decision strongly bolsters the Petitioner's contention that there is reasonable cause to believe that Respondent violated the Act as alleged by the Regional Director in the Petition for injunctive relief under Section 10(j) of the National Labor Relations Act. See, e.g. *Bloedorn v. Francisco Foods, Inc., d/b/a Piggly Wiggly*, 276 F.3d 270, 288 (7th Cir. 2001); *Silverman v. JRL Food Corp.*, 196 F.3d 334, 335-337 (2d Cir. 1999); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 157 n.3, 161 (1st Cir. 1995); *Seeler v. Trading Port, Inc*., 517 F.2d 33, 37, n.7 (2d Cir. 1975).

As noted in earlier correspondence, the Administrative Law Judge's decision is not the final administrative decision of the Board. See, e.g. *Schaub v. West Michigan*

[1] The ALJ did not decide on the allegation that Respondent unlawfully withdrew recognition from the Union, as alleged in Case No. 29-CA-23137. Petitioner anticipates that the ALJ will issue his Decision and Order in that matter in the very near future.

Plumbing & Heating, Inc., 250 F.3d 962, 968 (6th Cir. 2001); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000). The Petitioner has been advised by Respondent that it will file exceptions to the ALJ's decision, and that Respondent intends to request a one month extension of time for filing from the current deadline of October 25, 2000. Furthermore, in accordance with the Board's Rules and Regulations, Petitioner may file an answering brief opposing Respondent's exceptions, and Respondent could then file a reply brief. In view of the numerous stages remaining in this administrative proceeding, along with the length of the Judge's decision, it is likely that the Board will require a considerably long period of time to review the record, analyze the ALJ's 75-page decision, analyze the exceptions to the ALJ's factual and legal findings, and issue its Decision. Thus, Petitioner anticipates many more months of administrative litigation. See, e.g. *Levin v. Fry Foods, Inc.*, 108 LRRM 2208, 2209 (N.D. Ohio 1979), aff'd. 108 LRRM 2280 (6th Cir. 1981) (issuance of ALJD does not terminate 10(j) decree.) See also, *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 28 and 31, 129 LRRM 2660 (6th Cir. 1988) (error for district court to limit duration of 10(j) decree to commencement of ALJ hearing.) Thus, as the administrative litigation is still ongoing and the time before a final Board Order may be considerable, the risk of irreparable harm to the discriminatees and to the Union's bargaining strength not only continues, but also increases. Moreover, in light of the ALJ's finding that Respondent never intended to bargain in good faith with the Union and that Respondent deliberately devised a plan to rid itself of the Union by, among other things, dragging out negotiations to allow for the expiration of the certification year (ALJD, p.67, ln. 36-45, p.69, ln. 12-15), the Respondent should not further benefit from its unlawful conduct by allowing more time to pass without interim injunctive relief.

Based on the above, it is clear that the Administrative Law Judge has found that Respondent has violated the Act in the manner set forth in the 10(j) Petition. Further, despite the ALJ's decision, injunctive relief is still warranted.

Thank you for your consideration of this matter.

Respectfully submitted,

Nancy K. Reibstein
Counsel for Petitioner

APPENDIX P

Instructions and Sample Letter, Motion and Memorandum to Expedite District Court Decision

APPENDIX P

APPENDIX P-1

INSTRUCTIONS FOR EXPEDITING DISTRICT COURT DECISION

If a district court fails to issue a decision within thirty (30) days after the close of the Section 10(j) hearing or the last court filing, the Region should take the following course of action:

l. The Region initially should communicate orally with the court, through the judge's clerk, concerning the status of the case.[1] If a decision appears imminent, no further action need be taken other than to inform the Injunction Litigation Branch (ILB) of the case's status.

2. If the Region believes that a prompt decision is not forthcoming, the Region should send a letter to the court informing the court of the pendency of the Region's Section 10(j) petition, the statutory priority of this proceeding, and the need to prevent irreparable injury to employee statutory rights as earlier described in the Region's court papers. Copies of this letter should be send to counsel for the other parties and the ILB.[2]

3. If no decision has issued within thirty (30) days after transmission of the letter, the Region should again orally communicate with the judge's clerk about the status of the case. If a decision appears imminent, no further action is necessary. However, if it appears that no prompt decision is likely, then the Region should file a formal motion to expedite the case with the Court[3] and make an appropriate status report to the ILB.

4. If the district court has failed to rule on the motion to expedite within thirty (30) days, or has ruled on the motion but failed to issue a decision within an additional 30 days, the Region should again orally inquire about the status of the case with the judge's clerk. If a decision appears imminent, no further action is necessary. If no decision appears likely, the Region should send a second letter to the court setting forth the procedural history of the case and again requesting expedition.

5. Finally, if no decision has issued after an additional four (4) to eight (8) weeks, the Region should communicate with the ILB concerning whether to file a petition for writ of mandamus in the court of appeals to compel the district court to rule on the Section 10(j) petition.

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[1] Some district courts do not approve of parties orally communicating with the judge's clerk. If the Region is so informed, then all subsequent communications should be made in writing to the judge, with a copy served on the respondent.

[2] A sample letter is attached.

[3] A sample motion to expedite and supporting memorandum follows these instructions.

APPENDIX P

The Region should promptly advise the ILB of all developments concerning expediting the Section 10(j) decision and send to the ILB copies of all letters and motions.

APPENDIX P

APPENDIX P-2

United States Government

NATIONAL LABOR RELATIONS BOARD
Region 29
One MetroTech Center North
Jay Street and Myrtle Avenue - 10th Floor
Brooklyn, New York 11201-4201

September 13, 2000

The Honorable Frederick Block
United States District Court
For the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ALVIN BLYER V. PRATT TOWERS, INC.
Case No. CV-00-2499

Dear Judge Block:

On May 2, 2000, this office filed a petition for injunctive relief pursuant to Section 10(j) of the National Labor Relations Act with the Court in the above referenced matter. On May 9, 2000, Petitioner filed a Motion to Try the 10(j) Petition on the Basis of Administrative Hearing Transcripts and Exhibits. All such materials were submitted to the Court by May 25, 2000. On August 8, 2000, Counsel for Petitioner spoke with law clerk Patrick Walsh who indicated that the matter is pending, but that he did not know when a decision would be made…

Although we recognize that the Court is faced with a heavy calendar, we were hopeful that by this time we would have a decision, keeping in mind the need for expedition, in light of the priority nature of this case under 29 U.S.C. Section 1657(a) and the legislative intent behind Section 10(j) of the National Labor Relations Act. See,*Kaynard v. MMCI, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984) (Congress intended Section 10(j) as a "swift interim remedy to halt unfair labor practices.") See also *Hoeber v. IBEW, Local No. 3*, 498 F. Supp. 122 (D.N.J. 1980) (while district court has authority to refer 10(j) petition to a magistrate, court remained cognizant of statutory priority and mandated expedited processing.)

Moreover, any further delay only increases the on-going risk of irreparable harm to the discriminatees, the Union and the public interest. See *Maram v. Universidad Interamericana*, 722 F.2d 953, 960 (1st Cir. 1983) (even if passage of time while case is pending before court may "diminish the curative effect of the relief," an interim injunction would still be more effective to restore the status quo than the Board's ultimate

order without interim relief.) Cf. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), cert. denied 384 U.S. 972 (remedial action must be speedy in order to be effective.")

Furthermore, it should be noted that even when the Administrative Law Judge's decision issues, it will not be the final administrative decision of the Board, and the Board's review of exceptions which may be filed by either party may entail many more months of administrative litigation. See, e.g. *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 968 (6th Cir. 2001); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000). See also, *Fleischut v. Nixon Detroit Diesel, Inc*., 859 F.2d 26, 28 and 31 (6th Cir. 1988) (error for district court to limit duration of 10(j) decree to commencement of ALJ hearing.)

Accordingly, this letter is to inquire about the status of the case and again request an expeditious decision and recommended order.

Respectfully submitted,

April M. Wexler
Counsel for Petitioner

APPENDIX P

APPENDIX P-3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the **NATIONAL LABOR RELATIONS BOARD**, for and on behalf of the **NATIONAL LABOR RELATIONS BOARD,** Petitioner v. **ALDWORTH COMPANY, INC.** and **DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC., JOINT EMPLOYERS** Respondents	Civil No. 99-CV-3568 (JBS)

PETITIONER'S MOTION TO EXPEDITE DECISION

The Petitioner hereby moves this Court for an expedited decision on the Petition for Injunction Under Section 10(j) of the National Labor Relations Act, As Amended, filed on July 28, 1999 in the above-captioned case. The Petitioner urges that the action herein for injunctive relief under Section 10(j) of the National Labor Relations Act, as amended, is a matter designated under 28 U.S.C. Sec. 1657 as warranting expedited treatment. The reasons

supporting this motion are set forth in the accompanying memorandum. Oral argument is not requested.

Respectfully submitted this 9th day of August, 2000.

_____
RICHARD P. HELLER
Counsel for the Petitioner
National Labor Relations Board, Region Four
One Independence Mall, 7th Floor
615 Chestnut Street
Philadelphia, Pennsylvania 19106
(Telephone: (215) 597-7633)

APPENDIX P

APPENDIX P-4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the **NATIONAL LABOR RELATIONS BOARD**, for and on behalf of the **NATIONAL LABOR RELATIONS BOARD**, Petitioner v. **ALDWORTH COMPANY, INC. and DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC., JOINT EMPLOYERS** Respondents	Civil No. 99-CV-3568 (JBS)

MEMORANDUM IN SUPPORT OF MOTION TO EXPEDITE

I. Statement of the Case

This proceeding is before this Court on a petition filed by the Regional Director for Region Four of the National Labor Relations Board, herein called the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 20 U.S.C. Sec. 160(j)), herein called the Act, for a temporary injunction pending final disposition of the matters involved herein pending before the Board on charges filed by United Food and Commercial Workers Union Local 1360 a/w United Food and Commercial Workers International Union, AFL-CIO-CLC, herein called the Union, and by William A. McCorry, an individual. The charges allege that Aldworth Company, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., Joint Employers, herein called Respondent Aldworth and Respondent Dunkin', respectively, or Respondents, have engaged in, and are engaging in, unfair labor practices within

the meaning of Section 8(a)(1), (3) and (5) of the Act. The Petition herein is predicated upon the Petitioner's conclusion that there is reasonable cause to believe that Respondents have engaged in the unfair labor practices charged and that injunctive relief is necessary in order to effectuate the purposes of the Act.

A hearing on the same factual issues as those raised by the Petition herein was duly held before Administrative Law Judge William G. Kocol of the Board beginning on June 21, 1999, and ending on September 16, 1999, with all parties being present and participating therein. On July 28, 1999, the Petitioner moved this Court to receive the transcript and exhibits before the Administrative Law Judge and to have this Court base its determination as to whether the Petitioner has shown reasonable cause to believe that Respondents have violated the Act as alleged in the Petition on that record. This Court received copies of the transcript and exhibits before the Administrative Law Judge. The parties appeared before this Court on November 18, 1999, and again on December 20, 1999, and made their arguments concerning the propriety of the injunction sought by the Petitioner. Briefs were filed with this Court by the Petitioner on November 16, 1999 and December 2, 1999, and by Respondents on November 9 and 10, 1999.

By letter of March 6, 2000, the undersigned inquired concerning the status of this matter and respectfully requested an expeditious decision and order. This Court responded to this request on March 10, 2000. On April 20, 2000, Administrative Law Judge Kocol issued his Decision in the administrative proceeding. By letter of April 25, 2000, the undersigned enclosed a copy of Judge Kocol's decision, and set forth the pages of his Decision which supported the allegations of the Petition and the injunctive relief requested therein. The letter also noted the continuing risk of irreparable harm to the individual employees Judge Kocol found to be victims

of Respondents' discriminatory conduct and the likely erosion of bargaining strength the Union was being forced to sustain in the absence of injunctive relief.

The Court acknowledged receipt of Judge Kocol's Decision on April 27, 2000, and afforded Respondents until May 11, 2000 to file their responses to his Decision which would complete the record in the proceeding before the Court. On April 28, 2000, Respondent Aldworth notified this Court that it had new evidence to present, and followed that letter with an 18-page letter brief attaching a petition purporting to show that Respondents' employees did not wish to be represented by the Union. For its part, Respondent Dunkin' submitted a response on May 10, 2000, asking the Court to act affirmatively on the positions advocated by Respondent Aldworth and to urge that the Petition be denied. Because Respondents' submissions raised new matters, the undersigned sought leave to respond and attached a letter of May 19, 2000 setting forth the Petitioner's objections to Respondent Aldworth's new information. The Petitioner submitted that the attachments to Respondent Aldworth's letter were procedurally improper and of no legal effect. The Petitioner urged the Court to consider this "evidence" as affirmation of the need for injunctive relief. In this regard, the undersigned's letter noted, and it is well-settled, that anti-union petitions, like the one attached to Respondent Aldworth's May 10 letter, are not reliable indicators of employee sentiments concerning union representation since they are the unfortunate consequence of Respondent's prolonged and unremedied coercion. This legal principle was noted in the undersigned's May 19 response. On May 30, 2000, Respondent Aldworth forwarded to the Court 55 statements from employees purporting to show that their signatures on the anti-union petition were uncoerced. By letter of June 6, 2000, the undersigned requested that these newly-submitted documents be excluded from the record.

APPENDIX P

In the May 19, 2000 letter objecting to Respondent Aldworth's submission of these documents, the Court was advised that the Union had filed unfair labor practice charges alleging that Respondents had unlawfully solicited employees to sign the petition and engaged in further coercive conduct surrounding the circulation of the petition. The Regional Director has recently determined that the unfair labor practice charges have merit and that Respondents' agents were responsible for circulating the anti-union petition and soliciting employees to sign it. Accordingly, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on July 28, 2000, a copy of which is attached hereto. The Consolidated Complaint further alleges that Respondents have unilaterally implemented new working conditions and a disciplinary policy pursuant to which at least five bargaining unit employees have been suspended. Finally, the Consolidated Complaint alleges that an agent of Respondents unlawfully interrogated an employee. In bringing this information to the Court's attention, the Petitioner does ***not*** seek additional relief, nor does she wish to contribute to any further delay in the Court's consideration of the extant Section 10(j) Petition. The injunctive relief already sought, if granted, would be entirely adequate to restrain Respondents from the conduct found by Judge Kocol as well as that set forth in the Consolidated Complaint attached hereto. All parties understand that the Regional Director's determinations are not conclusive and that these new allegations must be proven in a separate proceeding before an Administrative Law Judge of the Board, not before this Court. However, just as the allegations of the Consolidated Complaint have yet to be proven, Respondents should not be able to maintain that the anti-union petition enjoys some presumptive validity. As noted above, the petition is defective as a matter of law, and, ultimately, may be found, as a matter of fact, to be the latest unlawful salvo in Respondents' crusade against the Union.

APPENDIX P

II. An Expedited Decision is Warranted In This Matter

The instant petition warrants expedited treatment. Until 1984, Section 10(i) of the Act provided that "petitions filed under [the NLRA should] be heard expeditiously, and if possible within 10 days after they have been docketed." Public Law 98-620, "The Federal Courts Civil Priorities Act' (FCCPA) repealed Section 10(i) of the Act and other such priority statutes and replaced them with a uniform provision, 28 U.S.C. Sec. 1657(a) which requires the courts to "…expedite the consideration of…any action for temporary or preliminary injunctive relief." Therefore, based upon the priorities established by the FCCPA, this matter warrants expedited treatment. See also *Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984) (Congress intended Section 10(j) as a "swift interim remedy to halt unfair labor practices"); *Hoeber v. IBEW Local No. 3*, 498 F.Supp. 122, 125 (D.N.J. 1980) (while district court has authority to refer 10(j) petition to a magistrate, Court remained cognizant of statutory priority and mandated expedited processing). Moreover, any further delay only increases the on-going risk of irreparable harm to the discriminatees, the Union and the public interest. See *Maram v. Universidad Interamericana*, 722 F.2d 953, 960 (1st Cir. 1983) (even if passage of time while the case is pending before the Court may "diminish the curative effect of the relief," an interim injunction would still be more effective to restore the status quo than the Board's ultimate order without interim relief). Cf. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966) ("remedial action must be speedy in order to be effective").

In addition, the Courts have recognized that the very nature of 10(j) and 10(l) cases qualifies them for expedited treatment independent of the statutory provisions for expedition. In *Fuchs v. Hood Industries, Inc.*, 590 F.2d 305, 397 (1979), for example, the First Circuit held that a 10(j) or a 10(l) petition must be granted priority status <u>not solely</u> as a result of the mandate of

Section 10(j) of the Act, but because the very nature of these proceedings dictates expeditious judicial consideration. The Court held in *Fuchs* that it was an abuse of judicial discretion for a District Court to refuse to consider the merits of a 10(j) petition until after the issuance of an Administrative Law Judge's Decision in the underlying administrative proceeding. The Court concluded:

> The injunctive relief provided for in Section 10(j) is interlocutory in nature; it is designed to fill the considerable gap between the filing of the complaint by the Board and the issuance of its final decision…By declining even to review the petition before the administrative law judge renders his decision, … the court in effect summarily denied the petition for the duration of much of its useful life. 590 F.2d at 397.

With specific reference to Section 10(l) cases, the courts have similarly concluded that the enumerated violations require prompt judicial relief to avoid obstructions to the free flow of commerce and to prevent violators of the Act from carrying out their unlawful objectives before the Board can act. See, e.g. *Hirsch v. BCTC of Philadelphia*, 530 F.2d 298, 302 (3rd Cir. 1976); *Henderson v. the I.U.O.E., Local 701*, 420 F.2d 802, 808-809 (9th Cir. 1969); *Squillacote v. Graphic Arts International Union (GAIU), Local 277*, 513 F.2d 1017, 1023 (7th Cir. 1975). Thus, "judicially created priority" with respect to petitions filed pursuant to Section 10(j) or 10(l) of the Act, has been recognized. The legislative history of the FCCPA makes it clear that it was not intended to eliminate or discourage the continuation of judicially created priorities which experience has shown are warranted. Sec. 130 Cong. Rec. No. 129, S 12930 (daily ed. October 3, 1984) (remarks of Sen. Leahy and Sen. Dole). Based on the foregoing, there are two bases upon which to expedite the decision in this matter, the statutory mandate of the FCCPA and the judicially created priority.

APPENDIX P

The Petitioner recognizes that the Court has a heavy calendar and that the record in this case is extensive. However, due to the need for expedition noted above, and especially since the issuance of Administrative Law Judge Kocol's decision, it is respectfully submitted that too much time has passed without a decision on the Petition. The position of the aggrieved parties has continued to seriously erode during this long hiatus. The Petition already chronicles instances of unilateral changes implemented by Respondents, some of which have led to the suspensions or discharges of bargaining unit employees, several of whom are major Union activists. The attached Consolidated Complaint refers to more unilateral changes that have resulted in the suspensions of additional bargaining unit employees. The employees no doubt sought Union representation, in part, to negotiate changes in their terms and conditions of employment and to enjoy the benefits and protections that flow from collective bargaining. It is asking a great deal of them to keep in mind that ultimately a retroactive bargaining order may protect them, especially as they witness the decline in their ranks under new rules and policies. Without an immediate decision on the merits of the Section 10(j) Petition, the strength of the Union may be irretrievably lost. See e.g. *Frye v. Specialty Envelope, Inc.*, 10 F. 3d 1221, *1226 (6th Cir. 1993) (citing *Asseo v. Centro Medico del Turabo*, 900 F. 2d 445 (1st Cir. 1990), (10(j) order the only effective way to prevent irreparable erosion of employee support for the Union, notwithstanding intervening decertification petition). The Petitioner therefore respectfully submits that prompt judicial consideration is mandated herein by the Congressional and judicially recognized need for the interim relief in such proceedings and to avoid frustration of the policies and remedial purposes of the Act. See generally, *Sheeran v. American Commercial Lines, Inc., et al.*, 683 F2d 970, 979 (6th Cir. 1982).

APPENDIX P

III. Conclusion

The facts herein, as set forth in the Petition and the record evidence, establish a need for an expedited decision due to the great volume of unfair labor practices committed by the Respondents and their continuing nature.

Respectfully submitted,

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APPENDIX Q

SAMPLE CONTEMPT MEMO AND PETITION FOR CONTEMPT

APPENDIX Q

APPENDIX Q-1

UNITED STATES GOVERNMENT
memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: May 16, 2013

TO: Jonathan B. Kreisberg, Regional Director
Region 1

FROM: Barry J. Kearney, Associate General Counsel,
Division of Advice

SUBJECT: *Kreisberg v. HealthBridge Management, LLC, et al.* *Contempt Chron*
Case No. 3:12-CV-1299 (RNC)
(D. Conn. Dec. 14, 2013)
NLRB Cases 34-CA-083335, et al.

The Region submitted this matter for advice as to whether to institute civil contempt proceedings collectively against joint employers HealthBridge Management, LLC, ("HealthBridge") and five healthcare centers, and their corporate officers (collectively, the "Employers") for their failure to comply with the good-faith bargaining, reinstatement, and restoration of lawful economic terms and conditions of employment requirements of the Section 10(j) order captioned above. The Region also requested advice on whether, in light of a bankruptcy order relieving the five healthcare centers from complying with the restoration of the economic terms of the Section 10(j) order, civil contempt proceedings should be instituted to compel only respondent joint employer HealthBridge Management and various related non-respondents to comply with those economic terms. We agree that civil contempt proceedings should be instituted against HealthBridge Management and its officers for its failure to restore the lawful economic terms ordered by the district court, but that contempt proceedings against the healthcare centers and various other nonparties are not warranted at this time.

I. BACKGROUND

A. The Section 10(j) Petition

This case primarily concerns the Employers' efforts to undermine their employees' bargaining representative during negotiations for successor collective-bargaining agreements at the five care centers by bargaining in bad faith, prematurely declaring impasse, and making unilateral changes to employees' terms and conditions of employment before a valid impasse was reached. The Union went on an unfair labor

practice strike caused, at least in part, by the unilateral changes, and offered to return to work under the pre-unilateral implementation terms and conditions of employment.

On September 7, 2012, the Region instituted Section 10(j) proceedings in this matter. The Region's Section 10(j) petition alleged that there was reasonable cause to believe that the Employers violated Section 8(a)(1), (3), and (5) as described above. The petition sought, among other things, a cease and desist order and an affirmative order requiring the Employers to reinstate all striking employees, to reinstate the previous lawful wages and other terms and conditions of employment, and to bargain in good faith with the Union.

B. The District Court Orders

On December 11,[1] 2012, the district court granted the Board's request for injunctive relief, and entered an order requiring that the Employers reinstate the strikers, reinstate the previous terms and conditions of employment, and bargain in good faith with the Union. The court found reasonable cause to believe that the Employers violated the Act as alleged and concluded that interim relief was necessary to preserve the Board's remedial authority and serve the public interest. The Employers appealed that order to the Second Circuit; that appeal is still pending.

C. The Employer's Post-Decree Conduct

On December 12, 2012, the Union requested the Employers meet about reinstatement. The Employer ignored the Union’s request and instead petitioned for an emergency stay of the reinstatement and restoration of terms and conditions provisions with both the district court and the Second Circuit. The district court denied the stay, but on December 14 the Second Circuit granted an emergency stay of the reinstatement and reimplementation orders pending consideration by a motions panel. The Employers did not seek, and were not granted, a stay of the order to bargain in good faith. On January 30, 2013, the Second Circuit denied the Employers’ motion for a stay. The Employers then twice appealed for a stay to the United States Supreme Court, and were ultimately rejected on February 6.

On February 7, without notifying or bargaining with the Union, the Employers mailed letters to striking employees offering reinstatement. On February 8, the Union again requested bargaining about the reinstatement process. The Employers responded that they wished to know if the Union had moved at all on the pension plan issue, and wanted to meet to bargain over that. The Employers added that the reinstatement issue could also be discussed then. The Union countered that contract negotiations would only begin when the Employers had fully complied with the 10(j) injunction and the playing field had been leveled. The Union also made several information requests at that time,

[1] The district court's December 11 order was clarified on December 14.

many of which the Employers ignored.[2] The parties finally met on February 18 to discuss the reinstatement issue, where it was agreed that the employees would return to work March 3.

On February 24, without prior notice to the Union, the five individual healthcare centers (but not HealthBridge Management) filed for bankruptcy protection in the United States Bankruptcy Court for the District of New Jersey.[3] Specifically, the centers requested temporary relief from the terms of the expired collective-bargaining agreements under 11 U.S.C. § 1113(e), arguing that they would no longer be able to operate or pursue reorganization without implementation of interim modifications to the terms and conditions of bargaining unit members. Essentially, the centers requested they be allowed to reinstate the unilateral changes that initially caused the unfair labor practice strike. On March 4, the bankruptcy judge issued an order authorizing the care centers to implement the modifications to their expired contracts through April 12. On April 10, the court extended the interim modifications through July 15.

The Union again requested information from the Employers, who agreed to open the books of the five bankrupt care centers. The Union now refuses to bargain over a new contract until the Employers have fully complied with the Section 10(j) injunction.

II. AUTHORIZATION TO INSTITUTE CIVIL CONTEMPT PROCEEDINGS

We agree with the Region that there is "clear and convincing" evidence that Respondent HealthBridge has not complied with the district court's order because it has not reinstated the employees' lawful terms and conditions of employment. Accordingly, the Region is authorized to institute civil contempt proceedings against HealthBridge and its officers. However, we do not agree that contempt proceedings are currently warranted against the healthcare centers or any other nonparties.

A. General Applicable Principles of Civil Contempt

The general applicable principles regarding civil contempt are contained in the Section 10(j) Manual.[4] Those arguments and cases should be set forth in the Region's memorandum of points and authorities that is submitted to the district court. In addition, the court should be informed that because a Section 10(j) decree orders a party to comply with relevant principles of the National Labor Relations Act, it "implicitly incorporate[s] the basic principles that the Labor Board and the courts have developed to guide the

[2] Complaint issued March 29, 2013, on the healthcare centers' failure to furnish information during this period, in Case 01-CA-096349.

[3] Case No. 13-13653-DHS.

[4] *See generally* Section 10(j) Manual User's Guide, § 10.6 & Appendix Q, Sample Contempt Memorandum and Petition for Contempt.

application of these provisions."[5] Thus, the court should look to labor law principles to determine whether a respondent is in compliance with its Section 10(j) order.[6]

B. Authorization to Institute Civil Contempt Proceedings

The Region is authorized to institute civil contempt proceedings against HealthBridge Management and its officers. First, we agree that the district court's orders are clear and unambiguous. The court's order, in plain, unequivocal terms, requires the Respondents, including HealthBridge specifically, to bargain in good faith with the Union, and reinstate the striking employees to their former jobs at their previous wages and other terms and conditions of employment, displacing, if necessary, any worker(s) contracted for, hired, or reassigned to replace them, or, if their former jobs are no longer available, to substantially equivalent positions.

We agree with the Region that there is clear and convincing evidence of HealthBridge's failure to make reasonably diligent efforts to comply with the district court's orders. The order requires the Respondents to reinstate the striking employees to their former jobs at their pre-implementation terms and conditions of employment. While the healthcare centers have received permission via their bankruptcy proceedings to modify the court-ordered terms of the old collective-bargaining agreements, HealthBridge has received no such permission, and is still bound by the district court's injunction. Accordingly, HealthBridge is in noncompliance with the court injunction.

Moreover, HealthBridge's officers have also failed to comply with the district court's order. Federal Rule of Civil Procedure 65(d)(2)(B) states that an injunction binds "the parties' officers, agents, servants, employees, and attorneys," as long as they have actual notice of the injunction. As the Supreme Court has noted,

> A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt.[7]

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[5] *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 718 (7th Cir. 1987).

[6] *See id.*

[7] *Wilson v. U.S.*, 221 U.S. 361, 376 (1911). *See also Nat'l Spiritual Assembly of the Baha'is of the United States of Am. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Baha'is of the United States of Am., Inc.* 628 F.3d 837, 848 (7th Cir. 2010) ("officers, employees, and other agents of an enjoined party must obey the injunction—even if they are not named parties—when they act in their official capacity").

As the Seventh Circuit has noted, "incorporeal abstractions act through agents."[8] Therefore, those officers of HealthBridge that are responsible for failing to comply with the district court order can be held individually in contempt and should be named, individually, as additional respondents in contempt.[9] Since HealthBridge's Senior Vice President of Labor Relations signed the declaration of compliance with the injunction, it is clear that she had actual notice of the injunction. The Region should also name any other officers, such as the President, Executive Vice President, or any operating officers who may have had the ability to execute the corporation's compliance with the court's order, if the Region has evidence that they had actual knowledge of the order. Since the officers are not named parties to the court order, they do have a right to individual notice and an opportunity to be heard in the contempt proceeding, so the Region should serve process on all contumacious officers.[10]

Officers who do not have the ability to reinstate the prior terms and conditions of employment would not be in contempt. Therefore, unless the Region has reason to believe that HealthBridge's CFO has such authority, he should not be included in any contempt proceeding.[11] However, if the Region has some reason to believe an officer with actual knowledge of the injunction could implement the court's order, but has no proof of that ability, the Region should name that officer as an additional respondent in contempt; he or she will have the opportunity to prove an inability to comply.

It is likely HealthBridge and its officers will argue that the company is unable to comply with the court order because it does not control the terms and conditions of employment that the district court ordered restored. Inability to comply with a court order is a long-recognized defense to civil contempt, but the burden is on the alleged contemnor to substantiate their claim "plainly and unmistakably."[12] HealthBridge will likely argue that the collective-bargaining agreements are exclusively between the healthcare centers and the Union, and that all employee terms and conditions of employment are determined and paid for by the healthcare centers. In addition, HealthBridge may argue that, through its management contracts with the healthcare centers, it is merely an agent of the centers and is thus only bound to the district court order to the extent that the healthcare centers are bound, and that it thus shares in the

[8] *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 417 (7th Cir. 1995) (holding company president in contempt for company's failure to comply with court order).

[9] *See NLRB v. Maine Caterers, Inc.*, 732 F.2d 689, 691 (1st Cir. 1984); *NLRB v. Hopwood Retinning Co.*, 104 F.2d 302, 304–05 (2d Cir. 1939) (holding president of respondent corporation in contempt for corporation's failure to reinstate workers).

[10] *See Reich*, 50 F.3d at 418.

[11] As financial officers, CFOs traditionally have no authority over company operations.

[12] *Donovan v. Sovereign Sec., LTD.*, 726 F.2d 55, 59–60 (2d Cir. 1984) (quoting *Hodgson v. Hotard*, 436 F.2d 1110, 1116 (5th Cir. 1971)).

healthcare centers' bankruptcy from complying with the restoration portion of the injunction.

The Region has adduced abundant evidence, summarized below, to prove that HealthBridge determines or co-determines the terms and conditions of employment of the bargaining unit employees. This evidence shows that, regardless of the fact that the bankruptcy court relieved the care centers' from complying with the injunction, HealthBridge itself is perfectly capable of independently restoring those terms and conditions of employment. The Region should also be prepared to contest any claim that HealthBridge merely acted as an agent at the direction of the healthcare centers.

HealthBridge may also argue that the injunction itself is improper since HealthBridge is not a joint employer with the healthcare centers, and thus should not have been included as a respondent in the Section 10(j) injunction. However, a party may not contest the legitimacy of an injunction by refusing to comply, absent a stay in court. As the Supreme Court has held, an injunction must be obeyed "however erroneous the action of the court may be."[13] In that case, the Court held that the respondent had to comply with the district court's temporary restraining order despite the respondent's belief that the district court lacked jurisdiction. Moreover, an issue may not be raised for the first time in a contempt proceeding where the parties earlier had opportunity to raise the issue.[14] HealthBridge did not contest before the district judge the Director's claim that it was a joint employer with the healthcare centers, and was directly ordered by the district court to restore the terms and conditions of employment. Thus, HealthBridge may not now begin a "retrial of the original controversy" in the contempt phase.[15] The district court's orders are to be respected until such time as they are "reversed for error by orderly review, either by itself or by a higher court."[16]

In any event, there is strong evidence to support the Director's conclusion that there was reasonable cause to believe that HealthBridge is a joint employer with the healthcare centers. Joint employer status "is essentially a factual issue."[17] In the Second Circuit, an essential element of any joint employer determination is whether there is sufficient evidence of immediate control over the employees.[18] The factors used to determine this element are whether the alleged joint employer "(1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of

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[13] *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293–94 (1947).

[14] *United States v. Rylander*, 460 U.S. 752, 756–57 (1983).

[15] *See Maggio v. Zeitz*, 333 U.S. 56, 69 (1948).

[16] *United Mine Workers of Am.*, 330 U.S. at 294.

[17] *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

[18] *SEIU, Local 32BJ v. NLRB*, 647 F.3d 435, 442 (2d Cir. 2011).

hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process."[19] In addition, "even a very substantial qualitative degree of centralized control of labor relations does not in itself determine the joint employer issue."[20] Rather, the factors must be taken together. Thus, where an alleged joint employer is somewhat involved in the collective-bargaining process, but otherwise only engages in limited supervision, a joint employer status will not be found.[21]

Here, there is evidence that HealthBridge met all these factors. HealthBridge played a leading role in all negotiations with the Union, setting the healthcare centers' labor relations policy. HealthBridge also was integral in the hiring and firing of laundry workers and replacement workers in recent disputes with the Union. HealthBridge also self-insures all employees in all of its affiliated healthcare centers. Finally, there is evidence that HealthBridge officials, some of whom are also officials of the healthcare centers, directly supervise employees and, through employee manuals, dictate all terms and conditions of the unit employees not controlled by collective-bargaining agreements. This evidence thus strongly supports the Director's position that there was reasonable cause to believe that HealthBridge is a joint employer with the healthcare centers.[22]

The Region also requested advice on whether to commence contempt proceedings against the healthcare centers and HealthBridge because of their alleged failure to bargain in good faith. As noted above, the parties did not request a stay of their duty to bargain in good faith, and did not seek relief from that duty in bankruptcy court. Accordingly, the Employers' two-month long failure to respond to Union requests to meet to discuss reinstatement and other issues technically was contempt of the district court order. However, the five healthcare centers have now opened their books,[23] and while the Union claims that the Employers are still bargaining in bad faith, the Region has not yet found sufficient evidence to support that claim.

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[19] *Id.* at 443 (quoting *AT&T v. NLRB*, 67 F.2d 446, 451 (2d Cir. 1995)).

[20] *Int'l House v. NLRB*, 676 F.2d 906, 915 (2d Cir. 1982) (quoting *Pulitzer Publ'g Co. v. NLRB*, 618 F.2d 1275, 1280) (8th Cir. 1980)).

[21] *AT&T v. NLRB*, 67 F.2d at 451–52.

[22] Although the Director's burden in the 10(j) case is to prove reasonable cause to believe that HealthBridge is a joint employer that determines or codetermines the economic terms and conditions of employment required to be restored by the district court's order, the evidence here is sufficient to meet even the higher "clear and convincing" standard for contempt.

[23] The Region concluded HealthBridge's failure to open its books was not an unfair labor practice.

APPENDIX Q

The purpose of civil contempt is to coerce parties into complying with court orders. Here, it appears that the Employers are currently willing to meet and bargain with the Union. Indeed, there is evidence that the Union is refusing to meet and bargain with the Employers. Nevertheless, since civil contempt is to coerce compliance, and there is not sufficient evidence to show clearly and convincingly that the Employers are refusing to bargain, contempt proceedings to require good faith bargaining are not warranted.

We also would not allege that the Employers contumaciously delayed offering employees reinstatement. The Employers did not offer employees reinstatement until one week after the Second Circuit denied the motion for a stay. The one-week delay technically is contempt, however employees can be made whole for this delay in the underlying administrative proceeding. Therefore, rather than inject in the contempt proceeding a dispute with the Employers as to whether the one-week delay was justified now that the employees have been reinstated, the Region should seek this relief in compliance.

The Region also requested advice as to whether to allege in the contempt proceedings that the healthcare centers' filing for bankruptcy protection was in contempt of the Section 10(j) injunction, and whether various non-parties such as Care Realty, LLC, Care One, LLC, and Daniel and Moshael Straus should also be named in a contempt petition. We conclude that the filing for bankruptcy protection should not be alleged as contempt. Where a party seeks a discharge of a debt incurred under a court order that is non-dischargeable, that party may be found in contempt of court.[24] However, we could find no precedent supporting the proposition that seeking and obtaining a lawful bankruptcy order can violate another court's order where the bankruptcy court has notice of that other order, as here.[25] As to alleging that the owners of the healthcare centers are in contempt, alleging that "a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt," even if that person was not a party to the original injunction.[26] However, there must be evidence that the non-party has "helped bring about" what the decree has forbidden.[27] Here, there is currently insufficient evidence that HealthBridge's "sole member," Care One, LLC, directed HealthBridge to not comply with the district court's injunction, or otherwise aided in its contumacious actions. If evidence surfaces to the contrary, the Region may resubmit this issue to ILB.

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[24] *See Henderson v. Henderson*, 389 S.W.3d 260, 266 (Mo. Ct. App. 2012).

[25] *See* Alois Valerian Gross, Annotation, *Contempt Based on Violation of Court Order Where Another Court has Issued Contrary Order*, 36 A.L.R.4th 978 (1985). *Cf. Asseo v. Bultman Enters., Inc.*, 951 F. Supp. 307, 313–14 (D.P.R. 1996) (ruling that company was in contempt where it had petitioned for bankruptcy but had not obtained bankruptcy court relief from complying with district court's order).

[26] *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930).

[27] *Id.* at 833.

Finally, we conclude that the Region should not seek discovery in the contempt proceedings to further establish the liability of various entities for noncompliance with the district court order. Contempt proceedings are usually "summary in form and swift in execution."[28] Further, it would undercut an argument that a particular entity is "clearly and convincingly" in contempt discovery is necessary to establish or further establish liability in contempt. HealthBridge has admittedly not restored the prior terms and conditions of employment, so no new evidence is necessary to prove it is in noncompliance with the injunction. Discovery should thus be avoided if possible in order to obtain the fastest relief.[29]

III. PRAYER FOR CIVIL CONTEMPT RELIEF

The petition for an adjudication and order in civil contempt and for other civil relief should specifically plead and seek the following purgation order requiring HealthBridge and the additional individual respondents in contempt to:

1. comply with all provisions of the district court's order of December 14, as well as all provisions of this purgation order;

2. reinstate the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all unilateral changes implemented by Respondents;

3. pay to the Board compensatory damages for all the costs and expenditures incurred in the investigation and prosecution of this contempt proceeding;[30] these costs shall include attorneys' fees of Board personnel;[31] said amounts, unless agreed upon by

[28] *Ryals v. United States*, 69 F.2d 946, 947 (5th Cir. 1934).

[29] If the Region is unable to determine which individual officers are responsible for HealthBridge's failure to comply with the court order, it should consult with ILB to determine whether limited discovery is necessary to determine their identities. However, actual notice of the court order by such individuals would still be necessary to establish liability in contempt.

[30] *See, e.g., Levine v. Fry Foods, Inc.*, 108 LRRM 2208, 2212 (N.D. Ohio 1979), *aff'd mem*. 657 F.2d 268 (6th Cir. 1981); *Asseo v. Bultman Enterprises, Inc.*, 951 F. Supp. at 312.

[31] Board attorneys fees would be at the "prevailing rate" for hourly rates charged by the private bar in the area. *See, e.g., Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 861–62 (7th Cir. 1981); *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1092–93 (3d Cir. 1988). The Region will have to maintain on a daily basis a record of the time spent on the contempt case by professionals. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983); *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983). The ILB will, upon the grant of such relief in the contempt proceeding, provide the Region with records

the parties, shall be fixed by the Court upon further submission by the Board of a verified statement of costs and expenses;[32]

4. promptly post copies of the District Court's Contempt Opinion and Purgation Order at the HealthBridge's premises in all places where notices to its affected employees are normally posted; maintain such postings free from all obstructions and defacements for the duration of the 10(j) decree;[33] all unit employees shall have free and unrestricted access to said postings; and grant reasonable access to agents of Region 1 of the Board to all such locations to monitor compliance with this posting requirement;[34]

5. promptly serve copies of the District Court's Contempt Opinion and Purgation Order on each officer of each of the five healthcare centers as well as on each officer of HealthBridge, and obtain signed acceptances of such copies from each officer and submit the originals of those acceptances to the Regional Director of Region 1 of the Board;

6. within 20 days of the entry of this Contempt Purgation Order, serve upon the District Court, with a copy submitted to the Regional Director of Region 1 of the Board, a sworn affidavit by a responsible HealthBridge corporate official and by each of the individual additional respondents, setting forth with specificity the manner in which they have complied with the terms of this Contempt Purgation Order;[35]

7. grant reasonable, periodic access to agents of the Board to all of HealthBridge's corporate records, payroll data, personnel records and files, for inspection and reproduction, to assure compliance with the terms of the Court's injunction order and the Contempt Purgation Order;[36] and

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of the costs incurred by the Division of Advice. We will also send you materials to compute the "prevailing rate."

[32] *See, e.g., NLRB v. Bruce Cartage*, 654 F.2d 456, 458 (6th Cir. 1981); *Asseo v. Bultman Enterprises, Inc.*, 951 F. Supp. at 312.

[33] *See, e.g., Oil, Chemical Workers v. NLRB*, 547 F.2d 575, 597 (D.C. Cir. 1976); *NLRB v. S.E. Nichols of Ohio, Inc.*, 592 F.2d 326, 326–27 (6th Cir. 1974).

[34] *See NLRB v. Southwire Co*., 801 F.2d 1252, 1259 (11th Cir. 1986).

[35] *See, e.g., NLRB v. Southwire Co.*, 801 F.2d at 1259; *NLRB v. S.E. Nichols of Ohio, Inc.*, 592 F.2d at 327.

[36] *See, e.g., NLRB v. I.L.W.U. Local No. 13*, 549 F.2d 1346, 1355 (9th Cir.) (Board access to union hiring hall records to police compliance with order upheld by court); *NLRB v. S.W. Dixon*, 189 F.2d 38 (8th Cir. 1951) (Board access to company books and records to enable Board to decide if there was compliance with court decree); *Kobell v. Menard Fiberglass Prods.*, 678 F. Supp. 1155, 1167 (W.D. Pa. 1988) (Board access to employer financial records granted under Section 10(j) to police sequestration of assets decree).

8. comply with any other further relief of a remedial nature that the Court deems "just and proper" to coerce future compliance with the terms of the Section 10(j) decree.[37]

In addition, the Region should seek as part of the purgation order that HealthBridge and the named additional individual respondents in contempt, jointly and severally:

1. Pay to all bargaining unit employees, as compensatory damages, all backpay and/or fringe benefits, plus normal interest as computed in Board proceedings, accrued and owing as a result of HealthBridge's failure to implement the terms of the expired contract as required by the district court order.

Finally, the Region should further seek the imposition of a prospective compliance fine schedule upon HealthBridge and against the individual respondents in contempt to coerce them to fully comply with the terms of the injunctive decree and to refrain from further breaches of that injunction in the future.[38] The Region should thus seek prospective compliance fines, including daily compliance fines as specified,[39] payable to the National Labor Relations Board, as follows:

(a) $10,000.00 (ten thousand dollars) against HealthBridge, and $5,000 (five thousand dollars) against every named individual respondent in contempt, and a daily compliance fine of $500.00 (five hundred dollars) per day against HealthBridge, and $150 (one hundred and fifty dollars) per day against each named individual respondent in contempt, upon the failure of HealthBridge to comply with each of the paragraphs above, of the Contempt Purgation Order.

(b) $5,000.00 (five thousand dollars) against HealthBridge and $1,000 (one thousand dollars) against each named respondent in contempt for each future violation of any other provision of the Court's Section 10(j) decree.

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[37] *See generally Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 444 (1986), where the Supreme Court approved of innovative civil contempt sanctions so long as the sanctions were not meant to punish, but were "clearly designed to coerce compliance."

[38] *See, e.g., NLRB v. A-Plus Roofing*, 39 F.3d 1410, 1419 (9th Cir. 1994); *NLRB v. S.E. Nichols of Ohio, Inc.*, 592 F.2d at 327; *Humphrey v. Southside Electric Cooperative, Inc.*, 104 LRRM 2589, 2592 (E.D. Va. 1979) (contempt proceeding under Section 10(j)). As to the general factors to be used to set the size of a civil contempt fine, see *U.S. v. United Mine Workers*, 330 U.S. 258, 304 (1947); *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.).

[39] Daily compliance fines are appropriate in Board contempt proceedings. *See, e.g., NLRB v. A-Plus Roofing*, 39 F.3d at 1419; *Clark v. Int'l Union, UMWA*, 752 F. Supp. 1291, 1294 (W.D. Va. 1990) (contempt proceeding under Section 10(j)).

APPENDIX Q

The Region should also request of the Court a provision in the Contempt Purgation Order that any fines imposed and collected from the individual additional respondents in contempt shall neither be paid by nor reimbursed by any entity they control.

The Region should also seek expedited consideration by the Court of the contempt petition pursuant to 28 U.S.C. Section 1657(a) and the Congressional intent underlying Section 10(j) of the Act.

Upon the filing of your contempt papers in the district court, please send copies to the ILB and keep us advised of the progress of the contempt case.

B.J.K.

APPENDIX Q

APPENDIX Q-2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JONATHAN B. KREISBERG, Regional Director of Region 34 of the National Labor Relations Board, for and on behalf of the **NATIONAL LABOR RELATIONS BOARD** Petitioner vs. **HEALTHBRIDGE MANAGEMENT, LLC; 107 OSBORNE STREET OPERATING COMPANY II, LLC D/B/A DANBURY HCC; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD; 240 CHURCH STREET OPERATING COMPANY II, LLC D/B/A NEWINGTON HEALTH CARE CENTER; 1 BURR ROAD OPERATING COMPANY II, LLC D/B/A WESTPORT HEALTH CARE CENTER; 245 ORANGE AVENUE OPERATING COMPANY II, LLC D/B/A WEST RIVER HEALTH CARE CENTER; 341 JORDAN LANE OPERATING COMPANY II, LLC D/B/A WETHERSFIELD HEALTH CARE CENTER,** Respondents; and **LISA CRUTCHFIELD,** Additional Respondent in Contempt	3:12-cv-01299-RNC May 30, 2013

PETITION FOR ADJUDICATION AND ORDER IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

Counsel for Petitioner moves this Court, for and on behalf of the National Labor Relations Board (the "Board"), to adjudicate HealthBridge Management, LLC, ("Respondent HealthBridge") and additional respondent in contempt, Lisa Crutchfield (the "Additional Respondent") in civil contempt of this Court and to grant other civil relief for having violated and disobeyed, and for continuing to violate and disobey, the

Injunctive Order issued by this Court on December 11, 2012.[1] In support thereof, Petitioner respectfully shows as follows:

1. On September 7, 2012, Petitioner filed with this Court a Petition for Injunction under Section 10(j) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. § 160(j), seeking a temporary injunction order enjoining and restraining Respondent Healthbridge and several HealthBridge-managed Respondent Health Care Centers (collectively, the "Respondents") [2] from engaging in certain conduct violative of the Act, and affirmatively directing Respondent Healthbridge to take certain ameliorative action, including restoring the wages, benefits, and other terms and

[1] As modified on December 13, 2012 to correct a typographical error.

[2] The following Respondent Health Care Centers (the "Centers") are Respondents in the underlying 10(j) proceedings, but Petitioner is **not** seeking that these following Respondents be held in contempt at this time: 107 Osborne Street Operating Company II, LLC d/b/a Danbury Health Care Center (Respondent Danbury); 710 Long Ridge Road Operating Company II, LLC, d/b/a Long Ridge of Stamford, (Respondent Long Ridge); 240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (Respondent Newington); 245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (Respondent West River); 1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center (Respondent Westport) (collectively, the "Centers"), who filed voluntary petitions for Chapter 11 Bankruptcy relief in the U.S. Bankruptcy Court for the District of New Jersey on February 24, 2013. On March 4, 2013, the Debtors were provided with interim relief under 11 U.S.C. § 1113(e), and on April 10, that interim relief was extended by the Bankruptcy Court to July 15, 2013. The NLRB has appealed the Bankruptcy Court's Order in that case arguing that § 1113(e) does not authorize interim relief (i) in the absence of a current collective bargaining agreement ("CBA"), (ii) where the debtors have previously breached CBAs, or (iii) contrary to a prior federal district court injunction, where a necessary element of the § 1113(e) relief was previously litigated and decided in that injunction litigation. The Union has also appealed. Solely as a result of the Bankruptcy Court's Order, the Petitioner is not seeking acontempt adjudication against the Centers at this time, but will re-assess the situation if and when the Bankruptcy Order is overturned, and may seek a contempt adjudication at that time if required by the extant circumstances. A sixth health care center, 341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (Wethersfield) received permission in June 2012 to cease operations. Accordingly, references to the "Centers" or the "Respondents" will exclude Respondent Wethersfield.

condition of employment in place on June 16, 2012, prior to the implementation of Respondent's Last, Best, Final Proposal (the LBF Proposal).

2. On December 11, 2012, this Court issued an Injunctive Order (the "Injunctive Order") granting Petitioner's request for a preliminary injunction during the pendency of the administrative litigation now pending before the Board in Cases 34-CA-070823, et al. A copy of the Injunctive Order, as modified on December 13, 2012, is attached hereto as Exhibit A.

(a) Among other things, the Court's Injunctive Order affirmatively ordered Respondents to reinstate the employees' previous wages, benefits and other terms and conditions of employment that were in place on June 16, 2012, and rescind any or all unilateral changes implemented by Respondent Healthbridge.

(b) Respondents were further directed to file a sworn affidavit with the Court setting forth with specificity the manner in which it had complied with the Court's Order.

3. The Court electronically forwarded copies of its December 11, 2012 injunctive Order on that date to counsel for the parties, including Respondents' counsel, Rosemary Alito and James Glasser.

(a) Counsel for the Board received a copy of the Court's December 11, 2012 injunctive Order on the same date.

(b) Consistent with the Court's electronic service on the parties of its December 11, 2012 injunctive Order, service of that document on Rosemary Alito and James Glasser, Respondents' counsel, was presumptively effective on the same date.

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4. The following provisions of this Court's Injunctive Order have been in full force and effect since its issuance on December 11, 2012, and have been binding on Respondent Healthbridge, its officers, attorney and agents within the meaning of Rule 65(d) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), since service was effected upon Respondent's counsel on or about December 11, 2012:

(a) Respondent shall bargain in good faith with the Union as the exclusive collective bargaining representative of the employees;

(b) Respondent shall post copies of this Order at all of its facilities where notices to employees are customarily posted, including electronic posting if respondent customarily communicates with employees by such means; said postings shall be maintained free from all obstructions and defacements; and agents of the Board shall be granted reasonable access to the facilities to monitor compliance with this posting requirement; and

(c) on or before December 30, 2012, Respondent shall file with this Court, and submit a copy to the Regional Director of Region 34 of the Board, a sworn affidavit from a responsible official, stating with specificity the manner in which respondent has complied with this Order, including the exact locations where respondent has posted the required documents.

5. The following provisions of this Court's Injunctive Order were subject to an emergency partial stay by the Second Circuit Court of Appeals from December 17, 2012 until January 30, 2013 (a copy of the Appellate Court's December 17, 2013 Order

is attached as Exhibit B). Since January 30, 2013, the following provisions of the Court's Injunctive Order have been in full force and effect (a copy of the Appellate Court's January 30, 2013 Order is attached as Exhibit C), and have been binding on Respondent HealthBridge, its officers, attorneys, and agents within the meaning of Fed. R. Civ. P. 65(d), as service was effected upon Respondents' counsel on or about December 11, 2012:

(a) On or before December 17, 2012, Respondent shall offer every striker reinstatement to his or her former position, without prejudice to their seniority, rights and privileges previously enjoyed, displacing, if necessary, any other employees hired, transferred or reassigned to replace them;

(b) Respondent shall reinstate the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all unilateral changes implemented by Respondents;

6. This Court has jurisdiction under Section 10(j) of the Act to enforce the terms and conditions of the Injunctive Order through appropriate civil contempt proceedings.

7. At all material times, the following persons have been and continue to be agents of Respondent Healthbridge, acting within the meaning of Fed R. Civ. P. 65(d) and the scope of their agency authority:

(a) Daniel Straus, Owner of Respondent HealthBridge.

(b) Alberto Lugo, Executive Vice President and General Counsel of Respondent HealthBridge.

(c) Thomas McKinney, Senior Vice President of Respondent HealthBridge.

(d) Lisa Crutchfield, Senior Vice President, Labor Relations for Respondent HealthBridge.

(e) Edmund Remillard, Regional Director of Human Resources in Connecticut for Respondent HealthBridge.

(f) Lawrence Condon, Regional Director of Operations for Respondent HealthBridge, and Acting Administrator for Respondent Long Ridge.

(g) Cynthia Roessler, Administrator for Respondent Danbury;

(h) Lizabeth Carmichael, Administrator for Respondent Newington;

(i) Joanne Wallak, Administrator for Respondent West River;

(j) Marion Najamy, Administrator for Respondent Westport;

8. On December 28, 2012, Lisa Crutchfield, on behalf of Respondent Healthbridge, filed and submitted an affidavit of compliance as required by paragraph 4(c), above, a copy of which is attached as Exhibit D.

9. On about February 24, 2013, the Centers sought protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court").

(a) Pursuant to the Bankruptcy filing, on February 25, 2013, the Centers requested relief under 11 U.S.C. §1113(e) from certain terms and conditions of employment that were in effect on June 16, 2012.

(b) The Centers sought the Bankruptcy Court's permission to implement changes similar or identical to several of the changes implemented on June 17, 2012, which this Court had ordered rescinded.

(c) A hearing was held on March 1, 2013 regarding the Centers' request for relief under 11 U.S.C. § 1113(e).

(d) The striking employees returned to work at the Centers beginning March 3, 2013.

(e) On March 4, 2013, the Bankruptcy Court granted the Centers' requested interim relief for a period of 6 weeks. A copy of the Bankruptcy Court's Decision and Order is attached as Exhibit E.

(f) On April 10, 2013, the Bankruptcy Court provided the Centers with an additional 12 weeks of relief, pursuant to the Centers' motion. A Copy of the Bankruptcy Court's April 10 Order is attached as Exhibit F.

10. Based upon information and belief, Petitioner has, and there is, clear and convincing evidence that Respondent Healthbridge and the Additional Respondent have disobeyed and failed and refused, and continues to disobey and fail and refuse, to comply with the provisions of the Court's injunctive Order described above in paragraph 2, in the following respects:

(a) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to provide employees a 30-minute meal break, a benefit provided to employees on and prior to June 16, 2012.

(b) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to pay employees "daily overtime" for hours worked in excess of 8 per day, a benefit provided to employees on and prior to June 16, 2012.

(c) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to allow employees to accrue sick leave at the accrual rates in effect on and prior to June 16, 2012.

(d) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to provide employees with health and other insurance at no monthly cost to the employee, a benefit in effect on and prior to June 16, 2012.

(e) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to contribute to the District 1199 Pension Fund on behalf of eligible employees, a benefit provided to employees on and prior to June 16, 2012.

(f) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to contribute to the District 1199 Training Fund on behalf of eligible employees, a benefit provided to employees on and prior to June 16, 2012.

(g) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to pay a yearly uniform allowance to eligible employees, a benefit provided to employees on and prior to June 16, 2012.

(h) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to allow employees to accrue paid personal days, a benefit provided to employees on and prior to June 16, 2012.

(i) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to pay employees their wages on a weekly basis, a benefit provided to employees on and prior to June 16, 2012.

11. By memoranda dated March 5, 2013, copies of which are attached as Exhibit G, the returning employees were told that they would be working under the terms and conditions of employment described above in paragraph 10.

12. By letter dated March 6, 2013, a copy of which is attached as Exhibit H, the Union was informed that the returning employees were working, and would continue to work, under the terms and conditions of employment described above in paragraph 10.

13. The wages and benefits described above in paragraphs 10 are mandatory subjects of collective bargaining within the meaning of §§ 8(d) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(d) and 158(a)(5).

14. By the acts and conduct described above in paragraph 10, Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to obey and comply with the terms of the Court's injunctive Order. More particularly:

(a) By the acts and conduct described above in paragraph 10, Respondent Healthbridge and the Additional Respondent have disobeyed and failed to comply with affirmative paragraph 2 of the Court's Injunctive Order, which required Respondent Healthbridge to reinstate the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all implemented unilateral changes.

(b) By the acts and conduct described above in paragraph 10, Respondent Healthbridge and the Additional Respondent has disobeyed and failed to comply with affirmative paragraph 3 of the Court's Injunctive Order, which required Respondent Healthbridge to bargain in good faith with the Union as the exclusive collective bargaining representative of the employees.

WHEREFORE, Petitioner respectfully prays the following:

1. That the Court direct Respondent Healthbridge and the Additional Respondent to file with the Court and serve upon Petitioner, by a date certain, an answer to this Petition, specifically admitting or denying, or meeting by affirmative defense, each and every allegation of this Petition, and to file with the Court and serve upon Petitioner, by a fixed date, counter affidavits or declarations in support of any such denial or affirmative defenses.

2. That the Court direct Respondent Healthbridge and the Additional Respondent to appear before it, at a time and place to be fixed by the Court, and show cause, if any there be, why Respondent Healthbridge and the Additional Respondent should not be adjudged in civil contempt for disobeying and refusing to fully comply with the Court's injunctive Order of December 11, 2012.

3. That upon return of said order to show cause, and such other proceedings as are appropriate, the Court adjudge Respondent Healthbridge and the Additional Respondent in civil contempt of the Court's December 11, 2012 injunctive Order and that the Court issue the following purgation order requiring Respondent Healthbridge, its officers, agents, attorneys, owners, and all persons acting in concert or participation with it, as well as the Additional Respondent, to:

(a) comply with all provisions of the District Court's order of December 11, 2012, as well as all provisions of the Court's Contempt Purgation Order;

(b) reinstate and maintain the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all implemented unilateral changes;

(c) promptly post copies of the District Court's Contempt Opinion and Purgation Order at Respondent HealthBridge's premises and at each of the five Centers in all places where notices to its affected employees are normally posted; maintain such postings free from all obstructions and defacements for the duration of the 10(j) decree; all bargaining unit employees shall have free and unrestricted access to said postings; and grant reasonable access to agents of Region 1 of the Board to all such locations to monitor compliance with this posting requirement;

(d) promptly serve copies of the District Court's Contempt Purgation Order on each officer, agent, owner, and counselor of each of the Centers, as well as on each officer, agent, owner, and counselor, of Respondent HealthBridge, and obtain signed acceptances of such copies from each officer, agent, owner, and counselor, and submit the originals of those acceptances to the Regional Director of Region 1 of the Board;

(e) within 20 days of the entry of this Contempt Purgation Order, serve upon the District Court, with a copy submitted to the Regional Director of Region 1 of the Board, a sworn affidavit by a responsible corporate official of Respondent HealthBridge, and by the Additional Respondent, setting forth with specificity the

manner in which they have complied with the terms of the Court's Contempt Purgation Order;

(f) grant reasonable, periodic access to agents of the Board to all of Respondent HealthBridge's corporate records, payroll data, personnel records and files, for inspection and reproduction, to assure compliance with the terms of the Court's Injunctive Order and the Contempt Purgation Order; and

(g) comply with any other further relief of a remedial nature that the Court deems "just and proper" to coerce future compliance with the terms of the Section 10(j) decree.

4. In addition, Petitioner seeks as part of the purgation order that Respondent HealthBridge shall:

(a) pay to the Board compensatory damages for all the costs and expenditures incurred in the investigation and prosecution of this contempt proceeding; these costs shall include attorneys' fees of Board personnel; said amounts, unless agreed upon by the parties, shall be fixed by the Court upon further submission by the Board of a verified statement of costs and expenses;

(b) Pay to all bargaining unit employees at each of the Centers, as compensatory damages, all backpay and/or fringe benefits, plus normal interest as computed in Board proceedings, accrued and owing as a result of Respondent HealthBridge's failure to implement and maintain the terms and conditions of

employment in place on June 16, 2012, as required by the District Court's Injunctive Order.

5. Petitioner seeks the imposition of a prospective compliance fine schedule upon Respondent HealthBridge and the Additional Respondent to coerce them to fully comply with the terms of the injunctive decree and of the contempt purgation order and to refrain from further breaches of that injunction or that purgation order in the future. Thus, Petitioner seeks prospective compliance fines, including daily compliance fines as specified, payable to the National Labor Relations Board, as follows:

(a) $10,000.00 (ten thousand dollars) against Respondent HealthBridge, and $5,000 (five thousand dollars) against the Additional Respondent, and a daily compliance fine of $500.00 (five hundred dollars) per day against Respondent HealthBridge, and $150 (one hundred and fifty dollars) per day against the Additional Respondent, upon the failure of Respondent HealthBridge to comply with each of the paragraphs, noted above, of the Contempt Purgation Order.

(b) $5,000.00 (five thousand dollars) against Respondent HealthBridge and $1,000 (one thousand dollars) against the Additional Respondent for each future violation of any other provision of the Court's Section 10(j) decree.

6. That this Court include a provision in the Contempt Purgation Order that any fines imposed upon and collected from the Additional Respondent shall neither be paid for nor reimbursed by HealthBridge nor reimbursed by any entity she controls.

7. That this Court order any further relief or procedure of a remedial nature that the Court deems "just and proper" to coerce future compliance with the terms of the Court's December 11, 2012 Injunctive Order.

8. That this Court grant expedited consideration of this contempt Petition pursuant to 28 U.S.C. Section 1657(a) and the Congressional intent underlying Section 10(j) of the Act.

Respectfully submitted this 30th day of May, 2013.

/s/ John McGrath
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APPENDIX Q

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JONATHAN B. KREISBERG, Regional Director of Region 34 of the National Labor Relations Board, for and on behalf of the **NATIONAL LABOR RELATIONS BOARD** Petitioner vs. **HEALTHBRIDGE MANAGEMENT, LLC; 107 OSBORNE STREET OPERATING COMPANY II, LLC D/B/A DANBURY HCC; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD; 240 CHURCH STREET OPERATING COMPANY II, LLC D/B/A NEWINGTON HEALTH CARE CENTER; 1 BURR ROAD OPERATING COMPANY II, LLC D/B/A WESTPORT HEALTH CARE CENTER; 245 ORANGE AVENUE OPERATING COMPANY II, LLC D/B/A WEST RIVER HEALTH CARE CENTER; 341 JORDAN LANE OPERATING COMPANY II, LLC D/B/A WETHERSFIELD HEALTH CARE CENTER,** Respondents; and **LISA CRUTCHFIELD,** Additional Respondent in Contempt	3:12-cv-01299-RNC May 30, 2013

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR ADJUDICATION AND ORDER IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

I. STATEMENT OF THE CASE

Counsel for Petitioner[1] moves this Court, for and on behalf of the National Labor Relations Board (the Board), to adjudicate HealthBridge Management, LLC,

[1] When the underlying 10(j) proceedings were initiated, Petitioner Jonathan Kreisberg was the Regional Director of Region 34 of the NLRB. While those proceedings were

("Respondent HealthBridge") and Additional Respondent in contempt, Lisa Crutchfield (the "Additional Respondent") in civil contempt of this Court and to grant other civil relief for having violated and disobeyed, and for continuing to violate and disobey, the injunctive Order issued by this Court on December 11, 2012. In support thereof, Petitioner respectfully shows as follows:

On September 7, 2012, Petitioner filed in this Court a Petition for Injunction under Section 10(j) of the National Labor Relations Act (the "Act") (29 U.S.C. § 160(j) seeking a temporary injunction enjoining and restraining Respondent Healthbridge, and the Respondent Health Care Centers[2] managed by HealthBridge (collectively, with HealthBridge, the "Respondents") from engaging in certain conduct violative of the Act, and affirmatively directing Respondents to take certain ameliorative action.

On December 11, this Court granted the requested injunctive relief. The Court found that there was reasonable cause to believe that Respondents violated the Act by unilaterally implementing their last, best, final proposals without first having bargained with the Union to a good-faith impasse, and by refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work. The Court concluded that

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pending, Region 34 was made a Subregion of Region 1, and Petitioner became the Regional Director of Region 1.

[2] The following Respondent Health Care Centers (the "Centers") are Respondents in the underlying 10(j) proceedings, but Petitioner is **not** seeking that these following Respondents be held in contempt at this time: 107 Osborne Street Operating Company II, LLC d/b/a Danbury Health Care Center (Respondent Danbury); 710 Long Ridge Road Operating Company II, LLC, d/b/a Long Ridge of Stamford, (Respondent Long Ridge); 240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (Respondent Newington); 245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (Respondent West River); 1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center (Respondent Westport). A sixth health care center, 341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (Wethersfield) received permission in June 2012 to cease operations. Accordingly, references to the "Centers" or the "Respondents" will exclude Respondent Wethersfield.

interim relief was necessary to preserve the Board's remedial authority and serve the public interest. The Court affirmatively directed Respondents to, in relevant part:

> (1) on or before December 17, 2012, Respondents shall offer every striker reinstatement to his or her former position, without prejudice to their seniority, rights and privileges previously enjoyed, displacing, if necessary, any other employees hired, transferred or reassigned to replace them;
>
> (2) Respondents shall reinstate the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all unilateral changes implemented by Respondents;
>
> (3) Respondents shall bargain in good faith with the Union as the exclusive collective bargaining representative of the employees;[3]

Respondents immediately requested a partial stay of the Injunctive Order from this Court, which this Court denied on December 14, 2012. (ECF No. 54.)

Respondents filed a notice of appeal on December 12, 2012. Respondent also requested an emergency partial stay, as well as a partial stay pending appeal of the Injunctive Order, from the Court of Appeals for the Second Circuit. On December 17, 2012, the Court of Appeals granted an emergency partial stay – pertaining only to the first two paragraphs of affirmative relief – pending a decision by the next available motions panel on Respondents' motion for partial stay pending appeal. Respondents did not seek, and were not granted, a stay of the order to bargain in good faith. On January 30, 2013,[4] Respondents' motion for a partial stay pending appeal was denied, ending the emergency partial stay.

[3] The original version of the Order had a typographical error, which was corrected on December 13, 2012.

[4] Unless otherwise noted, all dates hereafter are in 2013.

Respondents then applied to Justice Ruth Bader Ginsburg for a stay, but were denied. Respondents next resubmitted their application for a stay to Justice Antonin Scalia, who referred it to the Supreme Court, which denied the application. (ECF No. 57.)

Respondents' appeal is still pending before the Court of Appeals. Oral arguments were heard on May 15, 2013.

The five operating Respondent Health Care Centers (the "Centers") subsequently filed voluntary bankruptcy petitions in the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court"), requesting interim relief under 11 U.S.C. § 1113(e)[5] from the terms of the expired collective bargaining agreements with the Union (the "CBAs"). The Bankruptcy Court granted the requested interim relief for an initial 6 weeks, and later granted additional interim relief for an additional 12 weeks. The NLRB and the Union moved to appeal the Bankruptcy Court's decision, and the U.S. District Court for the District of New Jersey has granted leave to appeal.[6] These contempt proceeding are ***not*** brought against the Centers at this time. Rather, Petitioner seeks that Respondent HealthBridge – which is not in bankruptcy – be found in contempt, as well as the Additional Respondent, HealthBridge's Senior Vice President for Labor Relations, who is not in bankruptcy either.

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[5] 11 U.S.C. § 1113(e) reads, in relevant part "If, during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement."

[6] *710 Long Ridge Road Operating Co. II, LLC, et al., v. U.S. Trustee*, Case No. 2:13-cv-02977-DMC (D.N.J.); *NLRB v. 710 Long Ridge Road Operating Co. II, LLC, et al.*, Case No. 2:13-cv-03247-DMC (D.N.J.); *New England Health Care Employees Union, District 1199 SEIU, et al., v. 710 Long Ridge Road Operating Co. II, LLC et al.*, Case No. 2:13-cv-03248-DMC (D.N.J.)

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II. STATEMENT OF FACTS AND LAW

In its Injunctive Order, this Court concluded that Petitioner presented evidence showing a reasonable cause to believe that Respondents did not bargain with the Union in good faith to a bona fide impasse before declaring impasse and unilaterally implementing its last, best final proposal (the "LBF Proposal"). (Contempt Pet. Exh. A, at 3.) Accordingly, this Court ordered Respondents to rescind the unilateral changes, and restore the wages, benefits, and other terms and conditions of employment previously existing on June 16, 2012. On December 17, 2012, Respondents obtained an emergency partial stay from the Second Circuit Court of Appeals. That emergency partial stay was dissolved on January 30, 2013, when a panel of the Court of Appeals denied Respondent's motion for partial stay. Yet at this time, the bargaining unit employees are not working under the terms and conditions in place on June 16, 2012.

On December 28, 2012, Respondents filed a declaration of compliance with this Court (Contempt Pet. Exh. D). That declaration was signed by Lisa Crutchfield, the Senior Vice President of Labor Relations for HealthBridge. (Id. at ¶ 1.)

On February 8, the Union requested[7] to meet with Respondents to negotiate the roughly 600 strikers' return to work. Copies of correspondence between the Union and Respondents is attached as Exhibit 1. The Union and Respondents met for several hours on February 18 to discuss reinstatement issues. At the end of the meeting, it was understood that the striking workers would return to work beginning March 3, and that their medical coverage would be established as of March 1. No mention of bankruptcy or insolvency was made at that meeting.

[7] The Union had originally requested that Respondents meet with it to discuss the reinstatement of the ULP strikers on December 12, 2012, but received no response.

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On Sunday, February 24, without warning to either the Union or the Region, the Centers – but not Respondent HealthBridge – filed voluntary bankruptcy petitions under Chapter 11 in the Bankruptcy Court.[8] On February 25, the five Centers requested temporary relief from the terms of the expired CBAs under 11 U.S.C. § 1113(e), arguing that they would no longer be able to operate or pursue reorganization without implementation of interim modifications to the terms and conditions of bargaining unit members' employment. (Exh. 2 at ¶¶ 2-4.) The Centers requested that they be permitted to reinstate many of the unilateral changes made on June 17, 2012, including the cessation of payments to the Union pension fund, charging employees new monthly premiums for insurance, and the elimination of paid lunch breaks.

On February 25, the Centers requested that the hearing on their motion be expedited – and held on March 1 – so that the proposed modifications could be made before the ULP strikers returned to work. (Exh. 3 at ¶ 7.) On February 26, the Bankruptcy Court granted the motion and set a hearing date of Friday, March 1. On March 1, a hearing was held in Newark, New Jersey.

The strikers returned to work on Sunday, March 3.

On March 4, the Honorable Donald H. Steckroth, Unites States Bankruptcy Judge, issued an order and an opinion (collectively, the "Bankruptcy Order") authorizing the Centers to implement the requested interim modifications to their CBAs through April 12, 2013 (Contempt Pet. Exh. E, at 2). Specifically, the Bankruptcy Order authorized the Centers to make the following changes:

[8] *In re 710 Long Ridge Road Operating Co. II, LLC et al.*, Case No. 13-13653-DHS (Bankr. D.N.J).

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1) DAILY WORK SCHEDULE. The Daily work schedule change from 8 hours including a 30-minute paid meal period to 7.5 hours plus a 30-minute unpaid meal period

2) OVERTIME. Paid at one and one half times the regularly hourly rate to be paid only after employee works 40 regular hours in a week as the law requires, and not on a daily basis anytime an employee works more than 8 hours a day

3) SICK LEAVE. Reduced from 12 days per year accruing at [sic] rate of one per month to an accrual rate of one hour of sick time for every 40 hours worked up to a total of 45 hours

4) MEDICAL AND PRESCRIPTION DRUG PLAN AND OTHER INSURANCE BENEFITS. Debtors seek to have unionized employees contribute towards the costs of medical and prescription drug plan and maintain the level of co-pays and co-insurance applicable to non-union employees

5) PENSION PLAN. Rather than contribute to the New England Health Care Employees Pension Fund, employees will be able to enroll in the 401(k) plan established after June 17, 2012 and Debtors will match 25% of employee contributions up to 3% of the annual salary

6) TUITION REIMBURSEMENT. Debtors will end contribution to the New England Health Care Training Fund

7) UNIFORMS. Discontinue uniform allowance of $300 per year

8) PERSONAL DAYS. Eliminate Personal Days

9) PAY FREQUENCY. Debtors want to maintain a bi-weekly payroll rather than revert to a weekly payroll because of the increased administrative and manpower costs associated with running twice as many payrolls in a year and developing the system functionality in moving back to a weekly payroll.

(Contempt Pet. Exh. E, at 5-6.) As the Court will no doubt recognize, each of these changes had been part of Respondents' LBF Proposal. Each of these changes had been unilaterally implemented by Respondents on June 17, 2012, and had been ordered rescinded by the Injunctive Order.

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On March 5, the returning employees were presented with memoranda informing them that, as of 11:00 pm the previous night, their wages, benefits, and other compensation would be set according to the Bankruptcy Order. (Contempt Pet. Exh. G.)

On March 6, Jonathan Kaplan wrote a letter to John Creane stating that the employees had returned to work on March 3 under the pre-implementation terms and conditions of employment, confirming that the Centers would be modifying the pre-implementation terms and conditions according to the Bankruptcy Order, and requesting that the Union meet to resume contract negotiations. (Contempt Pet. Exh. H., at 1.)

On April 10, the Bankruptcy Court extended the interim modifications through July 15. (Contempt Pet. Exh. F, at 2-4.) The NLRB has appealed the Bankruptcy Court's decision and orders, arguing that § 1113(e) does not authorize interim relief: (i) in the absence of a current CBA; (ii) where the debtors have previously breached CBAs; or (iii) contrary to a prior federal district court injunction, where a necessary element of the Section 1113(e) relief was previously litigated and decided in that injunction litigation. The Union has also appealed. Solely as a result of the Bankruptcy Court's Order, the Petitioner is not seeking a contempt adjudication against the Centers at this time, but will re-assess the situation if and when the Bankruptcy Order is overturned, and may seek a contempt adjudication at that time if required by the extant circumstances.

Thus few of the material facts, if any, are in dispute. Neither the Centers nor Respondent HealthBridge deny that the Union-represented employees are currently working under terms and conditions of employment different than those existing on June 16, 2012.

APPENDIX Q

III. ARGUMENT

A. General Applicable Principles of Civil Contempt

The Court's injunctive Order issued on December 11, 2012, and has been in full effect since January 30, 2013. It is an axiom of federal jurisprudence that an "order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947). This is so because the "interests of orderly government demand that respect and compliance be given" to such orders, and a party who "willfully refuses his obedience, does so at his peril." *Id.* at 303. "No one, no matter how exalted his public office, or how righteous his private motive, can be judge in his own case. That is what courts are for." *Id.*, at 308-309 (Justice Frankfurter, concurring); see also, *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) ("The [respondents] undertook to make their own determination of what the decree meant. They acted at their peril").

Injunctive orders of United States district courts are binding upon the respondent, as well as its officers, agents, employees, and attorneys. Fed. R. Civ. P. 65(d)(2). A non-party to the initial proceedings may be held in contempt if it is legally identified with the contemnor or abets the contemnor. *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930).

> A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

NLRB v. Hopwood Retinning Co., 104 F.2d 302, 305 (2d Cir. 1939) (holding company's president and principal owner liable in contempt), quoting *Wilson v. United States*, 221 U.S. 361, 376 (1911). *See also*, *Backo v. Local 281, Carpenters & Joiners*, 438 F.2d 176, 180 (2d Cir. 1970) (holding that officers' positions in respondent union "suggested prima facie that they had power to effect compliance with the order."); *NLRB v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977) ("It can hardly be argued that the principal officers of a labor union are not legally identified with it, and thus liable in contempt for disobeying an order directed to the union.").

"A court has the inherent power to hold a party in civil contempt in order to enforce compliance with an order of the court or to compensate for losses or damages." *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir. 1981) (citations, quotations omitted). The power of courts "to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *SEC v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir. 1981), quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). A respondent may be held in contempt "if the order is clear and unambiguous, the proof of noncompliance is clear and convincing, and the defendant has not been reasonably diligent and energetic in attempting to accomplish what was ordered." *Powell v. Ward*, 643 F.2d at 931 (citations, quotations omitted). The "basic proposition is that all orders and judgments of courts must be complied with promptly." *Jim Walter Resources, Inc. v. United Mine Workers of America*, 609 F.2d 165, 168 (5th Cir. 1980), citing *Maness v. Meyers*, 419 U.S. 449, 458 (1975). The contempt need not be willful. *NLRB v. Local 3,*

IBEW, 471 F.3d 399, 403 (2d Cir. 2006); *NLRB v. J.P. Stevens & Co.*, 563 F.2d 8, 16 (2d Cir. 1977).

Because a Section 10(j) decree orders a party to comply with the relevant principles of the National Labor Relations Act, it "implicitly incorporate[s] the basic principles that the Labor Board and the courts have developed to guide the application of these provisions. *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 718 (7th Cir. 1987). Thus, the court should look to labor law principles to determine whether a respondent is in compliance with its Section 10(j) order. *See id.*

Once a prima facie case for civil contempt is made, the burden shifts to the respondent to establish its defense. *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984). A respondent may not defend against a civil contempt citation by trying to re-litigate the legal or factual basis of the order alleged to have been breached. *See, e.g.*, *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 441 n. 21 (1986), and the cases cited therein. Nor may a respondent defend itself by reliance on a hyper-technical reading of an order. *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942) ("it is proper to observe the objects for which the relief was granted and to find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded.")

B. <u>Respondent's Conduct Violated the Injunctive Order</u>

The Injunctive Order was clear and unambiguous. The Order, in plain, unequivocal terms, requires the Respondents – including Respondent HealthBridge specifically – to restore the June 16, 2012 terms and conditions of employment, reinstate the striking employees to their former jobs at their previous wages and other terms and

conditions of employment, and to bargain in good faith with the Union. Furthermore, Respondent HealthBridge is specifically obligated under the Injunctive Order as a joint employer with the Centers to restore the prior terms and conditions of employment. Respondent HealthBridge did little, if anything, to contest its joint-employer status in the proceedings before this Court, and it cannot now credibly deny that it is a joint employer. An issue may not be raised for the first time in a contempt proceeding where the parties earlier had the opportunity to raise the issue. *United States v. Rylander*, 460 U.S. 752, 756-57 (1983).

There is clear and convincing evidence of Respondent HealthBridge's failure to comply with the Injunctive Order. The Order requires the Respondents to reinstate the striking employees to their former jobs at their pre-implementation terms and conditions of employment. Respondents have openly admitted that the bargaining unit employees are now working under terms and conditions of employment that differ from those terms and conditions in effect on June 16, 2012. While the Centers have received permission via their bankruptcy proceedings to modify the terms of the expired CBAs, Respondent HealthBridge has received no such permission, and is still bound by this Court's Injunctive Order. Accordingly, HealthBridge should be adjudged in contempt.

Ms. Crutchfield's position as HealthBridge's Senior Vice President of Labor Relations "identifies" Crutchfield with Respondent HealthBridge, and her actions in providing the December 28, 2012 declaration constitutes prima facie evidence that Crutchfield had both knowledge of the Injunctive Order and power to effect compliance with it. Fed. R. Civ. P. 65(d)(2); *Backo v. Local 281, Carpenters & Joiners*, 438 F.2d at

180. Accordingly, Ms. Crutchfield should be adjudged in contempt as an Additional Respondent.

C. Contempt Sanctions

1. Affirmative Purgation Order, Notice Remedies; Compliance Report

Petitioner requests that the Court require Respondent HealthBridge, its officers, agents, attorneys, owners and any person acting in concert or participation with it, to, affirmatively, restore the wages, benefits , and other terms and conditions of employment that were previously in place on June 16, 2012, in compliance with the terms of paragraph 2 of the December 11, 2012 Injunctive Order. The additional recommended remedies requiring Respondent HealthBridge to post notices to employees; to file a compliance report; and to permit the Board access to requested information, are all normal civil contempt remedies in cases arising under the Act. *See, e.g., NLRB v. S. E. Nichols of Ohio, Inc.,* 592 F. 2d 326, 326-327 (6th Cir. 1974); *Oil, Chemical Workers v. NLRB,* 547 F.2d 575, 597 (D.C. Cir. 1976), cert. denied 431 U.S. 966 (1977); *NLRB v. Service Employees Local* 77, 123 LRRM 3213, 3214-3215 (9th Cir. 1986); *NLRB v. Teamsters Local 85,* 101 LRRM 2933, 2934-2935 (9th Cir. 1979); *NLRB v. Ironworkers Local 86,* 79 LRRM 2723, 2724 (9th Cir. 1972).

2. Compensatory Remedies

The recommended remedies in paragraphs 4(a) and (b) of the Contempt Petition require Respondent Healthbridge to pay the Board's costs and attorneys' fees, and to pay and the bargaining unit employees’ lost wages and fringe benefits for the period between

the effective date of the Injunctive Order – January 30 – until the time at which the June 16, 2012 terms and conditions of employment are restored.[9]

The purpose of civil contempt is not to punish but "to secure future compliance with court orders and to compensate the party that has been wronged." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Technologies, Inc.*, 369 F.3d 645, 657 (2d Cir. 2004), citing *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1, 5 (2d Cir.1989), and *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979). *See also*, *Milburn v. Coughlin*, 83 F. App'x 378, 380 (2d Cir. 2003) ("The assessment of monetary sanctions in a civil contempt proceeding serves two purposes: to coerce future compliance and to compensate the plaintiff for any harms caused by the contempt.").

With respect to the Board's costs and attorneys' fees, it is well established that respondents who are found in civil contempt are commonly required to pay the expenses and attorneys' fees incurred by the Board in the investigation, preparation and presentation of contempt proceedings. *See, e.g.*, *Levine v. Fry Foods, Inc.,* 108 LRRM 2208, 2212 (N.D. Ohio 1979), affd. 657 F.2d 268 (6th Cir. 198 1); *Asseo v. Bultman Enterprises, Inc.,* 951 F. Supp. 307, 312 (D.P.R. 1996). *See also*, *W. E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 665 fn. 5 (2d Cir. 1970) ("The plaintiff in a civil contempt case may recover not less than the expenses, including counsel fees, which it has incurred in enforcing the disobeyed order of the court."). Board attorneys' fees are charged at the "prevailing rate" for hourly rates charged by the private bar in the area. *See, e.g., NLRB v. Local 3, IBEW*, 471 F.3d at 407. Petitioner will maintain on a daily basis a record of the

[9] Petitioner does not request that Ms. Crutchfield be required to pay compensatory remedies.

time spent on the contempt case by professionals. *See*, *Hensley v. Eckerhart*, 461 U.S. 424, 437 and n. 12 (1983); *Ramos v. Lamm*, 713 F. 2d 546, 553 (10th Cir. 1983).

It is also well settled that in civil contempt, "broad compensatory awards" are appropriate to make whole other parties injured by the contumacy. *United Mine Workers of America v. Bagwell*, 512 U.S. 821, 838 (1994), citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *Paramedics Electromedicina Comercial*, 369 F.3d at 658 (compensatory damages should correspond to the amount of damages); *NLRB v. J.P. Stevens & Co.*, 81 LRRM 2285 (2d Cir. 1972) (awarding backpay in contempt). Accordingly, to the extent that the bargaining unit employees have lost wages because of Respondent Healthbridge's failure to comply with the Court's Injunctive Order, they should be made whole by Respondent HealthBridge.

3. Prospective Fines

In order to coerce Respondent Healthbridge and the Additional Respondent to fully comply with the terms of the injunctive Order and the Court's Contempt Order, and to refrain from further breaches of either Order in the future, Petitioner seeks the imposition of a prospective fine schedule. It is well recognized that prospective compliance fines may be assessed in a civil contempt proceeding in order to insure future compliance with court orders. *NLRB v. J.P. Stevens & Co.*, 81 LRRM 2285; *NLRB v. Local 3, IBEW*, 471 F.3d at 406. *See also*, *NLRB v. A-Plus Roofing*, 39 F.3d 1410, 1419 (9th Cir. 1994); *NLRB v. S.E. Nichols of Ohio, Inc.*, 592 F.2d at 327; *Humphrey v. Southside Electric Cooperative, Inc.*, 104 LRRM 2589, 2592 (E.D. Va. 1979) (contempt proceeding under Section 10(j)). Daily compliance fines have been found appropriate in Board contempt proceedings. *See, e.g.*, *NLRB v. Local 3, IBEW*, 471 F.3d at 405; *NLRB*

v. A-Plus Roofing, 39 F.3d at 1419; *Clark v. Int'l Union, UMWA*, 752 F. Supp. 1291, 1294 (W.D. Va. 1990) (contempt proceeding under Section 10(j)).

Accordingly, Petitioner has requested a prospective fine of $10,000 against Respondent Healthbridge, and a daily compliance fine of $500 per day, upon the failure of Respondent Healthbridge to comply with each of paragraphs 3(a) – (g) of the recommended remedies in the Petition. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 304 (1947); *Perfect Fit Ind., Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.), cert. denied 459 U.S. 832 (1982). Petitioner seeks prospective fine of $5,000 against the Additional Respondent, and a daily compliance fine of $150 per day, upon the failure of Respondent HealthBridge to comply with each of paragraphs 3(a) – (g) of the recommended remedies in the Petition. Further, Petitioner seeks a separate prospective fine of $5,000 against Respondent Healthbridge and $1,000 against the Additional Respondent for each future violation of any other provision of the December 11, 2012 Injunctive Order.

IV. CONCLUSION

Based upon the foregoing, Petitioner has shown, by clear and convincing evidence, that Respondent Healthbridge did not, and is not, complying with the Court's Injunctive Order because bargaining unit employees are working under terms and conditions of employment different from those previously in place on June 16, 2012. Accordingly, Respondent Healthbridge and Additional Respondent should be found in contempt of the Injunctive Order, and the Court should impose upon Respondent Healthbridge and the Additional Respondent the order requested in the Petition for Contempt, to purge Respondent Healthbridge and the Additional Respondent of its

contumacious conduct, and to coerce Respondent Healthbridge and the Additional Respondent from engaging in further future breaches of the Court's Injunctive Order.

Respectfully submitted this 30th day of May, 2013.

___/s/ John McGrath_____
John A. McGrath
Phv No. 04849
Thomas E. Quigley
Federal Bar No. CT 05126
Attorneys for Petitioner,
National Labor Relations Board

APPENDIX R

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 01-62 **May 10, 2001**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Use of Special Informal Settlement Language in Cases with Outstanding Section 10(j) - 10(l) Injunctions

From time to time, cases in which the Board has obtained interim Section 10(j) or 10(l) relief are subsequently settled by an informal settlement agreement. This Memorandum provides revised settlement language that should be used in such cases to avoid any questions that the injunction continues in effect during the compliance period. Use of this language will insure that there is no procedural impediment to instituting proceedings for contempt of the injunction if a respondent fails to comply with the settlement.

Section 10(j) and 10(l) of the Act permit the Board to obtain temporary injunctive relief to remedy unfair labor practices pending the entry of the Board's final remedial order. It is well settled that any Section 10(j) or 10(l) injunctive order terminates by operation of law upon the Board's final disposition of a case.[1] We would normally take the position that the closing of a case on compliance, rather than execution of a settlement agreement, is the more accurate time for determining that a settled case has been "finally disposed of."

The language of the standard form informal settlement agreement currently provides, however, that approval of the settlement agreement constitutes withdrawal of the complaint. This provision creates the potential for a respondent to conclude that the case has been disposed of with the execution of the settlement and that the injunction thereupon expires by operation of law. Such an interpretation could interfere with our ability to institute proceedings for contempt of the injunction based on continued

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[1] See *Sears, Roebuck & Co. v. Carpet, Linoleum, etc. Local Union No. 419*, 397 U.S. 655 (1970) (final decision of Board in ULP proceeding ends 10(l) jurisdiction); *Levine v. Fry Foods, Inc.*, 596 F.2d 719 (6th Cir. 1979) (same principle under Section 10(j)); *Barbour v. Central Cartage Co.*, 583 F.2d 335 (7th Cir. 1978) (same); *Johansen v. Queen Mary Restaurant Corp.*, 522 F.2d 6 (9th Cir. 1975) (same).

misconduct during the compliance period, even if such action would constitute a breach of the settlement agreement sufficient to justify setting aside the agreement and litigating the unfair labor practice case.

Accordingly, to preserve the Board's authority to seek contempt sanctions under the 10(j) or 10(l) decree, and to avoid a controversy over the continued viability and enforceability of the outstanding 10(j) or 10(l) injunction during the compliance period of the settlement, the Region should modify the language of the standard form Board settlement agreement to make it perfectly clear that the respondent's entering into the settlement will not result in the withdrawal of the ULP complaint, dismissal of the charge or the vacating of the 10(j) or 10(l) injunction. Rather, by use of the special language set forth infra, the Region will clearly put the respondent on notice that the ULP complaint will be withdrawn and/or the charge will be dismissed only after the case is closed on compliance and that the 10(j) or 10(l) decree will remain in effect and enforceable as long as the complaint is outstanding or the charge still pending. This will permit the Board to initiate contempt proceedings before the district court, when otherwise warranted, where the misconduct takes place prior to the close of the compliance process.

Thus, when informally settling the underlying administrative case where the Board has obtained a Section 10(j) or 10(l) injunction, the Region should modify the standard informal settlement agreement by substituting, for the final sentence in the paragraph "Refusal to Issue Complaint," the following:

> The Complaint and any Answer(s) in [the captioned administrative cases and numbers] shall be withdrawn only upon closing of these matters on compliance. The Respondent agrees not to move to vacate, modify, dissolve, clarify or alter the injunction decree in [caption and case number of the Section 10(j) or 10(l) decree] on the basis that this Settlement Agreement has been reached. The closing of these matters on compliance will be considered the final adjudication of these cases before the Board for the purposes of [caption and case number of the Section 10(j) or 10(l) decree]. Until these matters have been closed on compliance, the injunction in [caption and case number of the Section 10(j) or 10(l) decree] will continue in full force and effect for all purposes.

If a Section 10(l) decree is obtained prior to the issuance of the ULP complaint, the special language of the settlement should be modified to provide that the dismissal of the charge will be held in abeyance until the case closes on compliance.

The Regions are instructed to seek such special language in all cases where respondents are prepared to enter into informal settlements after the entry of Section 10(j) or 10(l) injunctions. The Regions should continue to use established criteria in deciding whether a particular case can be adjusted through an informal settlement agreement. See Casehandling Manual (Part One), Section 10140.2. If a respondent is unwilling to accept

the special language described supra, the Region should consult with the Injunction Litigation Branch.

Any questions concerning this matter should be addressed to your Assistant General Counsel or Deputy.

/s/
R. A. S.

cc: NLRBU

Release to Public

APPENDIX S

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

* **

HUGH FRANK MALONE, Regional Director
of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

CIVIL ACTION
NO.

Petitioner,

v.

BEAIRD INDUSTRIES, INC.,

Respondent.

* *

Model

STIPULATION AND ORDER CONTINUING CASE UNDER 29 U.S.C. SECTION 160(j)

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioner, Hugh Frank Malone, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board ("the Board") and the Respondent, Beaird Industries, Inc. ("the Company"), by their respective attorneys and subject to the approval of the Court, that:

1. On [date], after securing authorization from the Board, the Petitioner, for and on behalf of the Board, filed a petition with this Court pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. Section 160(j), seeking a temporary injunction against the Company, pending the final administrative disposition of certain unfair labor

practice charges now pending before the Board, from violating Section 8(a)(1)[, (3) and (5)] of the Act, 29 U.S.C. Section 158(a)(1)[,(3) and (5)].

2. In consideration of the following undertakings of the Company, the Board agrees that the hearing before the Court on this Petition [now scheduled for {date}]shall be postponed indefinitely and that this cause of action shall be placed on the Court's inactive docket.

3. The parties further agree that the Company, pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al., will cease and desist from:

(a) Failing or refusing to recognize the United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union") as the exclusive collective-bargaining representative of its employees in the appropriate unit, of which the Union was certified as the exclusive bargaining representative on March 30, 1990;

(b) Failing or refusing to meet and bargain in good faith with the Union upon request;

(c) Failing or refusing to provide relevant information requested by the Union; and

(d) In any other manner failing or refusing to recognize and, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit of which the Union was certified as the exclusive bargaining representative on March 30, 1990.

4. The parties further agree that the Company will affirmatively continue, pending administrative completion of NLRB Cases 15-CA-11334-1, et al., to engage in the following affirmative conduct:

(a) Recognize and, upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit of which the Union was certified as the exclusive bargaining representative on March 30, 1990; and

(b) Promptly provide the Union with all requested information relevant to bargaining.

5. The parties further agree that if, upon investigation, the Board concludes that there is [reasonable cause to believe][a likelihood of success in demonstrating][1] that the Company, after the date of this stipulation, has resumed any of the acts or conduct described in paragraph 3, above, or failed to perform any of the acts or conduct set out in paragraph 4, above,

(a) the Board shall by motion apply to this Court for, and be granted, notwithstanding any local rule of this Court, an expedited hearing to be conducted no less than seven (7) days after said motion is filed, for the purpose of determining whether such [reasonable cause][likelihood of success][2] exists that the Company has failed to comply with the undertakings described in paragraphs 3 or 4, above; and

[1] Choose the language appropriate to the 10(j) standards in the applicable circuit.

[2] See fn. 1, ante.

(b) if the Court concludes that such [reasonable cause][likelihood of success][3] as alleged by the Board does exist, the Company shall not contest that interim injunctive relief is otherwise just and proper and the Court shall enter a temporary injunctive order to require the Company, pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al., to cease and desist from the conduct as described in paragraph 3, above, and to comply with the affirmative conduct described in paragraph 4, above.

6. Unless the provisions of paragraph 5, above are invoked by the Board, this case shall remain on the inactive docket of the Court pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al. After final disposition of these unfair labor practice cases, currently pending before the Board, the Board shall

[3] See fn. 1, ante.

cause this proceeding, including any injunctive order(s) issued by the Court pursuant to the provisions of paragraph 5, above, to be dismissed with prejudice and without costs to either party.

DONE at New Orleans, Louisiana on the date set forth below:

_____	_____
[Name]	[Name]
Counsel for Petitioner	Counsel for Respondent
[Address]	[Address]

Dated at _____
this ___ day of _____, 1995

APPROVED AND SO ORDERED this ___ day of _____, 1995.

_____
Judge [name]
UNITED STATES DISTRICT COURT